CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 31 SEPTEMBER 24, 1997 NO. 39

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decision

(T.D. 97–78)

REVOCATION OF GAUGER APPROVAL AND REVOCATION OF LABORATORY ACCREDITATIONS OF A CORE LABORATORY FACILITY LOCATED IN LONG BEACH, CALIFORNIA

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of accreditation of a Customs commercial and laboratory.

SUMMARY: Corelab Petroleum Testing Services, a Customs approved gauger and accredited laboratory under Section 151.13 of the Customs Regulations (19 CFR 151.13), has closed its Long Beach California laboratory and merged that site's operations with Saybolt, Inc.'s Customs accredited and approved Carson, California site. Accordingly, pursuant to 151.13(f) of the Customs Regulations, we hereby give notice that the Customs laboratory accreditations for the Corelab Long Beach facility have been revoked without prejudice.

EFFECTIVE DATE: August 28, 1997.

FOR FURTHER INFORMATION CONTACT: Ira S. Reese, Senior Science Officer, Laboratories and Scientific Services, U.S. Customs Service, 1301 Constitution Ave., NW, Washington, D.C. 20229 at (202) 927–1060.

Dated: September 5, 1997.

GEORGE D. HEAVEY,
Director,
Laboratories and Scientific Services.

[Published in the Federal Register, September 12, 1997 (62 FR 48131)]

U.S. Customs Service

General Notices

LIST OF FOREIGN ENTITIES VIOLATING TEXTILE TRANSSHIPMENT AND COUNTRY OF ORIGIN RULES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This document notifies the public of foreign entities which have been issued a penalty claim under § 592 of the Tariff Act, for certain violations of the customs laws. This list is authorized to be published by § 333 of the Uruguay Round Agreements Act.

FOR FURTHER INFORMATION CONTACT: For information regarding any of the operational aspects, contact Michael Compeau, Branch Chief, Seizures and Penalties Division, at 202–927–0762. For information regarding any of the legal aspects, contact Ellen McClain, Office of Chief Counsel, at 202–927–6900.

SUPPLEMENTARY INFORMATION

BACKGROUND

Section 333 of the Uruguay Round Agreements Act (URAA)(Public Law 103–465, 108 Stat. 4809)(signed December 12, 1994), entitled Textile Transshipments, amended Part V of title IV of the Tariff Act of 1930 by creating a § 592A (19 U.S.C. 1592A), which authorizes the Secretary of the Treasury to publish in the Federal Register, on a biannual basis, a list of the names of any producers, manufacturers, suppliers, sellers, exporters, or other persons located outside the Customs territory of the United States, when these entities have been issued a penalty claim under § 592 of the Tariff Act, for certain violations of the customs laws, provided that certain conditions are satisfied.

The violations of the Customs laws referred to above are the following: (1) Using documentation, or providing documentation subsequently used by the importer of record, which indicates a false or fraudulent country of origin or source of textile or apparel products; (2) Using counterfeit visas, licenses, permits, bills of lading, or similar documentation, or providing counterfeit visas, licenses, permits, bills of lading, or similar documentation that is subsequently used by the importer of record, with respect to the entry into the customs territory of

the United States of textile or apparel products; (3) Manufacturing, producing, supplying, or selling textile or apparel products which are falsely or fraudulently labeled as to country of origin or source; and (4) Engaging in practices which aid or abet the transshipment, through a country other than the country of origin, of textile or apparel products in a manner which conceals the true origin of the textile or apparel products or permits the evasion of quotas on, or voluntary restraint agreements with respect to, imports of textile or apparel products.

If a penalty claim has been issued with respect to any of the above violations, and no petition in response to the claim has been filed, the name of the party to whom the penalty claim was issued will appear on the list. If a petition, supplemental petition or second supplemental petition for relief from the penalty claim is submitted under 19 U.S.C. 1618, in accord with the time periods established by §§ 171.32 and 171.33, Customs Regulations (19 CFR 171.32, 171.33) and the petition is subsequently denied or the penalty is mitigated, and no further petition, if allowed, is received within 30 days of the denial or allowance of mitigation, then the administrative action shall be deemed to be final and administrative remedies will be deemed to be exhausted. Consequently, the name of the party to whom the penalty claim was issued will appear on the list. However, provision is made for an appeal to the Secretary of the Treasury by the person named on the list, for the removal of its name from the list. If the Secretary finds that such person or entity has not committed any of the enumerated violations for a period of not less than 3 years after the date on which the person or entity's name was published, the name will be removed from the list as of the next publication of the list.

Reasonable Care Required

Section 592A also requires any importer of record entering, introducing, or attempting to introduce into the commerce of the United States textile or apparel products that were either directly or indirectly produced, manufactured, supplied, sold, exported, or transported by such named person to show, to the satisfaction of the Secretary, that such importer has exercised reasonable care to ensure that the textile or apparel products are accompanied by documentation, packaging, and labeling that are accurate as to its origin. Reliance solely upon information regarding the imported product from a person named on the list is clearly not the exercise of reasonable care. Thus, the textile and apparel importers who have some commercial relationship with one or more of the listed parties must exercise a degree of reasonable care in ensuring that the documentation covering the imported merchandise, as well as its packaging and labeling, is accurate as to the country of origin of the merchandise. This degree of reasonable care must rely on more than information supplied by the named party.

In meeting the reasonable care standard when importing textile or apparel products and when dealing with a party named on the list published pursuant to § 592A of the Tariff Act of 1930, an importer should

consider the following questions in attempting to ensure that the documentation, packaging, and labeling is accurate as to the country of origin of the imported merchandise. The list of questions is not exhaustive but is illustrative.

1) Has the importer had a prior relationship with the named party?

2) Has the importer had any detentions and/or seizures of textile or apparel products that were directly or indirectly produced, supplied, or transported by the named party?

3) Has the importer visited the company's premises and ascertained that the company has the capacity to produce the merchandise?

4) Where a claim of an origin conferring process is made in accordance with 19 CFR 102.21, has the importer ascertained that the named party actually performed the required process?

5) Is the named party operating from the same country as is represented by that party on the documentation, packaging or labeling?

6) Have quotas for the imported merchandise closed or are they nearing closing from the main producer countries for this commodity?

7) What is the history of this country regarding this commodity?

8) Have you asked questions of your supplier regarding the origin of the product?

9) Where the importation is accompanied by a visa, permit, or license, has the importer verified with the supplier or manufacturer that the visa, permit, and/or license is both valid and accurate as to its origin? Has the importer scrutinized the visa, permit or license as to any irregularities that would call its authenticity into question?

The law authorizes a biannual publication of the names of the foreign entities. On April 1, 1997, Customs published a Notice in the Federal Register (62 FR 15563) which identified 14 (fourteen) entities which fell within the purview of § 592A of the Tariff Act of 1930.

592A List

For the period ending September 30, 1997, Customs has identified 16 (sixteen) foreign entities that fall within the purview of § 592A of the Tariff Act of 1930. This list reflects the addition of 2 new entities to the 14 entities named on the list published on April 1, 1997. The parties on the current list were assessed a penalty claim under 19 U.S.C. 1592, for one or more of the four above-described violations. The administrative penalty action was concluded against the parties by one of the actions noted above as having terminated the administrative process.

The names and addresses of the 16 foreign parties which have been assessed penalties by Customs for violations of § 592 are listed below pursuant to § 592A. This list supersedes any previously published list. The names and addresses of the 16 foreign parties, and the month and year, in parentheses, in which the name of the company was first published in the Federal Register, are as follows:

Azmat Bangladesh, Plot Number 22–23, Sector 2 EPZ, Chittagong 4233, Bangladesh. (9/96)

Bestraight Limited, Room 5K, World Tech Centre, 95 How Ming Street, Kwun Tong, Kowloon, Hong Kong. (3/96)

Cotton Breeze International, 13/1578 Govindpuri, New Delhi, India. (9/95)

Cupid Fashion Manufacturing Ltd., 17/F Block B, Wongs Factory Building, 368–370 Sha Tsui Road, Tsuen Wan, Hong Kong. (9/97)

Hanin Garment Factory, 31 Tai Yau Street, Kowloon, Hong Kong. (3/96)

Hip Hing Thread Company, No. 10, 6/F Building A, 221 Texaco Road, Waikai Industrial Centre, Tsuen Wan, N.T. Hong Kong. (3/96)

Hyattex Industrial Company, 3F, No. 207–4 Hsin Shu road, Hsin Chuang City, Taipei Hsien, Taiwan. (9/96)

Jentex Industrial, 7–1 Fl., No. 246, Chang An E. Rd.,Sec. 2, Taipei, Taiwan. (3/97)

Li Xing Garment Company Limited, 2/F Long Guang Building, Number 2 Manufacturing District, Sanxiang Town, Zhongshan, Guandgong, China. (9/96)

Meigao Jamaica Company Limited, 134 Pineapple Ave., Kingston, Jamaica. (9/96)

Meiya Garment Manufacturers Limited, No. 2 Building, 3/F, Shantou Special Economic Zone, Shantou, China. (9/96)

Poshak International, H–83 South Extension, Part–I (Back Side), New Delhi, India. (3/96)

Sun Weaving Mill Ltd., Lee Sum Factory Building, Block 1 & 2, 23 Sze Mei Street, Sanpokong, Bk 1/2, Kowloon, Hong Kong. (9/97)

Topstyle Limited, 6/F, South Block, Kwai Shun Industrial Center, 51–63 Container Port Road, Kwai Chung, New Territories, Hong Kong. (9/96)

United Fashions, C–7 Rajouri Garden, New Delhi, India. (9/95)

Yunnan Provincial Textiles Import & Export, 576 Beijing Road Kunming, Yun Nan, China. (3/96)

Any of the above parties may petition to have its name removed from the list. Such petitions, to include any documentation that the petitioner deems pertinent to the petition, should be forwarded to the Assistant Commissioner, Office of Field Operations, United States Customs Service, 1301 Constitution Avenue, Washington, D.C. 20229.

Additional Foreign Entities

In the April 1, 1997 Federal Register notice, Customs also solicited information regarding the whereabouts of 40 foreign entities, which were identified by name and known address, concerning alleged violations of § 592. Persons with knowledge of the whereabouts of those 40 entities were requested to contact the Assistant Commissioner, Office of Field Operations, United States Customs Service, 1301 Constitution Avenue, Washington, D.C. 20229.

In this document, a new list is being published which contains the names and last known addresses of 39 entities. This reflects the addition of six new entities to the list and the removal of seven entities from the list. The seven entities removed from the list are China Artex Corp.

Beijing Arts, Glee Dragon Garment Mfg. Ltd., Gold Tube Ltd., Hambridge Ltd., Kin Fung Knitting Factory, Moderntex International and Samsung Corporation.

Customs is soliciting information regarding the whereabouts of the following 39 foreign entities concerning alleged violations of § 592. Their names and last known addresses, and the month and year, in parentheses, in which the name of the company was first published in the Federal Register, are listed below:

Bahadur International, 250 Naraw Industrial Area, New Delhi, India. (9/95)

Madan Exports, E–106 Krishna Nagar, New Delhi, India. (9/95)

Gulnar Fashion Export, 14 Hari Nagar, Ashram, New Delhi, India. (9/95)

Janardhan Exports, E–106 Krishna Nagar, New Delhi, India. (9/95)

Morrin International, E–106 Krishna Nagar, New Delhi, India. (9/95)

Jai Arjun Mfg., Co., B 4/40 Paschim Vihar, New Delhi, India. (9/95)

Eroz Fashions, 535 Tuglakabad Extension, New Delhi, India. (9/95)

Shenzhen Long Gang Ji Chuen, Shenzhen, Long Gang Zhen, China. (9/95)

Traffic, D1/180 Lajpat Nagar, New Delhi, India. (9/95)

Raj Connections, E–106 Krishna Nagar, Delhi, India. (9/95)

Bao An Wing Shing Garment Factory, Ado Shi Qu, Bao An Shen Zhen, China. (9/95)

Guidetex Garment Factory, 12 Qian Jin Dong Jie, Yao Tai Xian Yuan Li, Canton, China. (9/95)

Dechang Garment Factory, Shantou S.E.Z., Cheng Hai, Cheng Shing, China. (9/95)

Guangdong Provincial Improved, 60 Ren Min Road, Guangdong, China. (9/95)

Kin Cheong Garment Factory, No. 13 Shantan Street, Sikou Country, Taishan, Kwangtong, China. (9/95)

Sam Hings Bags Factory, Ltd., #35 Tai Ping West Road, Jiu Jaing, Ghangdong, China. (9/95)

Luen Kong Handbag Factory, 33 Nanyuan Road, Shenzhen, Guangdong, China. (9/95)

Changping High Stage Knitting, Yuan Jing Yuan, Chau Li Qu Chang, Guangdong, China. (9/95)

Arsian Company Ltd, XII Khorcolo, Waanbaatar, Mongolia. (9/95)

Cahaya Suria Sdn Bhd, Lot 5, Jalan 3, Kedah, Malaysia. (9/95)

Crown Garments Factory Sdn Bhd, Lot 112, Jalan Kencana, Bagan Ajam, Malaysia. (9/95)

Richman Garment Manufacturing Co., Ltd., 7th Fl, Singapore Industrial Bldg., 338 Kwun Tong Road, Kowloon, Hong Kong. (9/95)

Herrel Company , 64 Rowell Road, Suva, Fiji. (9/95)

Belwear Co., Ltd., Flat C, 3rd Floor, Yuk Yat Street, Kowloon, Hong Kong. (9/95)

Kingston Garment Ltd., Lot 42–44 Caracas Dr., Kingston, Jamaica. (9/95)

Poltex Sdn, 8 Jalan Serdang, Kedah, Malaysia. (9/95)

Sam Hing International Enterprise, 5 Guernsey St., Guilford NSW, Australia. (9/95)

Societe Prospere De Vetements S.A., Lome, Togo. (9/95)

Confecciones Kalinda S.A., Zona Franca, Los Alcarrizos, Santo Domingo, Dominican Republic. (9/95)

Royal Mandarin Knitworks Co., Flat C 21/F, So Tau Centre, 11–15 Sau Road, Kwai Chung, N.T., Hong Kong. (9/95)

Wong's International, Nairamdliyn 26, Ulaanbaatar 11, Naaun, Mongolia. (9/95)

Lin Fashions S.A., Lot 111, San Pedro de Macoris, Dominican Republic. (9/96)

United Textile and Weaving, P.O. Box 40355, Sharjah, United Arab Emirates. (3/97)

Envestisman Sanayi A.S., Buyukdere Cad 47, Tek Is Merkezi, Istanbul, Turkey. (9/97)

Land Global Ltd., Block c, 14/F, Y.P. Fat Building, Phase 1, 77 Hoi Yuen Road, Kowloon Road, Hong Kong. (9/97)

Patenter Trading Company, Block C. 14/F, Yip Fat Industrial Building, Phase 1, 77 Hoi Yuen Road, Kowloon, Hong Kong. (9/97)

Zuun Mod Garment Factory Ltd., Tuv Aimag, Mongolia. (9/97)

Round Ford Investments, 37–39 Ma Tau Wai Road, 13/f Tower B, Kowloon, Hong Kong. (9/97)

Shanghai Yang Yuan Garment Factory, 2 Zhaogao Road, Chuanshin, Shanghai, China. (9/97)

If you have any information as to a correct mailing address for any of the above 39 firms, please send that information to the Assistant Commissioner, Office of Field Operations, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229.

Dated: September 5, 1997.

ROBERT S. TROTTER,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, September 15, 1997 (62 FR 48340)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, September 10, 1997.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

MARVIN M. AMERNICK,
(for Stuart P. Seidel, Assistant Commissioner,
Office of Regulations and Rulings.)

REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF A CERTAIN FOOD PRODUCT, "RANCH SEASONING"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by Section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat 2057), this notice advises interested parties that Customs is revoking New York Ruling Letter (NYRL) 878986, dated December 1, 1992, concerning the classification of a product known as "Ranch Seasoning".

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after November 24, 1997.

FOR FURTHER INFORMATION CONTACT: Norman W. King, Food and Chemicals Classification Branch, Office of Regulations and Rulings (202) 482–7097.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On July 30, 1997, Customs published in the CUSTOMS BULLETIN, Volume 31, Number 31, a notice of a proposal to revoke NYRL 878986, dated December 1, 1992 which held that a certain product known as "Ranch Seasoning" was classified in subheading 1901.90.80, Harmonized Tariff Schedule of the United States (HTSUS), as other food preparations of goods of headings 0401 to 0404, not elsewhere specified or included.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat 2057), this notice advises interested parties that Customs is revoking NYRL 878986 to reflect the proper classification of "Ranch Seasoning" in subheading 2103.90.80, HTSUS, as other mixed condiments and seasonings. Headquarters Ruling Letter 960688 revoking NYRL 878986, is set forth in the attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: September 10, 1997.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, September 10, 1997.

CLA–2 RR:TC:FC 960688K
Category: Classification
Tariff No. 2103.90.80

MR. PHILLIP J. CHRISTIE, SR.
3213 O'Street N.W.
Washington, DC 20007

Re: Revocation of New York Ruling Letter (NYRL) 878986, Dated December 1, 1992; "Ranch Seasoning".

DEAR SIR:

In response to your requests of August 17, and September 21, 1992, on behalf of McCormick & Co., Customs issued NYRL 878986, dated December 1, 1992. The ruling held that a product known as "Ranch Seasoning" was classified in subheading 1901.90.80, Harmonized Tariff Schedule of the United States (1992), which provided for other food preparations of goods of headings 0401 to 0404, not elsewhere specified or included. This letter is to inform you that NYRL 878986 no longer reflects the views of the Customs Service and is revoked in accordance with section 177.9(d) of the Customs Regulations (19 CFR 177.9(d)). Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat 2057, 2186 (1993), hereinafter, section 625), notice of the proposed revocation of NYRL 878986 was published on July 30, 1997, in the CUSTOMS BULLETIN, in Volume 31, No. 31. The following represents our position.

Facts:

The product called "Ranch Seasoning" from New Zealand was described in NYRL 878986 as a powder composed of 83 percent dry buttermilk, 15 percent salt, 1.5 percent garlic powder, .5 percent onion powder and found to contain 3.75 percent butterfat. The product was used as a flavoring ingredient in potato chips, crackers, and other salty snacks.

Issue:

The issue is whether the product composed of 83 percent milk powder is more appropriately described as a food preparation of milk (i.e., a good of heading 0401 to 0404) in heading 1901, or, as a seasoning in heading 2103, HTSUS.

Law and Analysis:

Heading 1901, HTSUS, provides, in part, for food preparations of goods of headings 0401 to 0404, not containing cocoa or containing less than 5 percent by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included. Headings 0401 to 0404, are milk provisions. Heading 1901 is a food preparation provision, which includes, in part, food preparations which derives its essential character from the milk ingredient.

Heading 2103, HTSUS, provides, in part, for food preparations consisting of mixed condiments and mixed seasonings. Heading 2103 does not require the presence of any one specific ingredient (such as milk). Also, heading 2103 is not qualified by the phrase "not elsewhere specified or included" as is heading 1901. Heading 2103 is a use provision. Additional U.S. Rules of Interpretation, 1(a), HTSUS, states that

> 1. In the absence of special language or context which otherwise requires—
>
> (a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.

In our opinion, the salt (15 percent), garlic (1.5 percent) and onion powder (.5 percent) significantly affect the organoleptic properties of the blend of "Ranch Seasoning" and the product belongs to a class or kind of goods composed of a variety of ingredients, principally used to flavor human foods during their preparation, i.e., a seasoning. The merchandise is classified in subheading 2103.90.50, HTSUS (1997), with duty at the general rate of 7 percent *ad valorem*.

Holding:

The product known as "Ranch Seasoning", as described above, is classified as other mixed condiments and seasonings, in subheading 2103.90.80, HTSUS (1997), with a general duty rate of 7 percent *ad valorem*.

NYRL 878986 is revoked.

In accordance with 19 U.S.C. 1625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), of the Customs Regulations (19 CFR 177.10(c)(1)).

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF A VOICE RECORDER AND A TALKING BOOKMARK

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying certain rulings pertaining to the tariff classification of a voice recorder and a talking bookmark. Notice of the proposed modification was published July 30, 1997, in the CUSTOMS BULLETIN, Volume 31, Number 31.

EFFECTIVE DATE: This decision is effective for merchandise entered or withdrawn from warehouse, for consumption on or after November 24, 1997.

FOR FURTHER INFORMATION CONTACT: Arnold L. Sarasky, Food and Chemicals Classification Branch, Office of Regulations and Rulings (202) 482–7020.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On July 30, 1997, Customs published a notice in the CUSTOMS BULLETIN, Volume 31, Number 31, proposing to modify New York Ruling Letter (NYRL) A80577, issued July 5, 1996, by the Director. National Commodity Specialist Division, New York, NY, which held that a voice recorder was classifiable in subheading 8520.90.0080, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which generally provides for magnetic recorders and other sound recording apparatus. That ruling held that a talking bookmark was classifiable in subheading 8543.89.9090, HTSUSA, which generally provides for electrical machines and apparatus. No comments were received concerning the matter.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying NYRL A85077 insofar as it misquotes the narrative of the first noted subheading and that it incorrectly classifies the last noted article. The subheading under which the voice recorder was classified is corrected without changing the classification of that merchandise. The ruling is further modified to reflect the proper classification subheading 3926.10.1000, HTSUSA, which provides for Other articles of plastics and articles of other materials of headings 3901 to

3914; Office or school supplies. Articles so classified are subject to a general rate of duty of 5.3 percent *ad valorem*.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: September 10, 1997.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, September 10, 1997.

CLA-2 RR:TC:FC 959981 ALS
Category: Classification
Tariff No. 3926.10.0000 and 8520.90.0000

MS. VIENNA H. DOWNES
MICRO GAMES OF AMERICA
16730 Schoenborn Street
North Hills, CA 91346-6122

Re: Reconsideration of New York Ruling Letter (NYRL) A80577, dated July 5, 1996.

DEAR MS. DOWNES:

This is in reference to your request of August 27, 1996, concerning 2 articles, a voice recorder and a "talking" bookmark. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by 623 of Title VI (Customs Modernization) of the North American Free Trade Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), we are modifying that ruling.

Facts:

The "Hide and Speak" voice recorder (article MGA-2300), is a 4 and ½ inch round shaped sound recording device. It is designed to be operated as a 'remote control' voice recording by allowing the user to activate its recording mechanism from up to 30 feet away. The article can record a 6 second message on an electronic microcircuit for playback and is battery powered.

The "Goosebumps Talking Bookmark" (article GB-875), consists of a plastic bookmark with a dimensional 'monster' face motif attached to an audio playback unit which sticks out from the pages of a book when the item is used as a bookmark. Two light sensitive plastic tabs extend from the above unit and slide over the page to mark the book reader's location. When the book is opened and these tabs are exposed, the light causes one of three electronically prerecorded 'scary' remarks to be played back. This article is battery powered.

Issue:

Are these articles classifiable as toys?

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI's)

taken in order. GRI 1 provides that the classification is determined first in accordance with the terms of the headings and any relative section and chapter notes. If GRI 1 fails to classify the goods and if the headings and legal notes do not otherwise require, the remaining GRI's are applied, taken in order.

In the request for reconsideration, the importer argues that the subject articles should be classified as toys in heading 9503, HTSUSA. It is noted that the "Hide and Speak" recorder contains only 6 seconds of recording capability. It is stated to compare to an item referred to as a "Talking R2D2 Robot" which was held to be classifiable as a toy (New York Ruling Letter A85383, dated July 1, 1996). It is stated that the recorder and the "Goosebumps Talking Bookmark" are marketed as toys in toy stores.

In regard to the recording device and its comparison to the robot, we note that the robot was shaped in the configuration of a robot creature. It was classified in a provision covering toys representing animals or nonhuman creature (for example, robots and monsters) and parts and accessories thereof: other, toys not having a spring mechanism. The instant recording device is not a representation of a robot, etc., Therefore, the above ruling is not governing in the classification of the instant article. The recorder, although marketed to children, is similar to other hand-held sound recording/reproducing devices marketed to the public which provide limited recording capability and quality of sound which have been found to be classifiable as a sound recording reproducing apparatus (Headquarters Ruling Letter (HRL) 958302, dated October 17, 1995. The environment of sale, advertisement and display, while one factor to consider, is not dispositive of the appropriate classification of an item.

We note that the Explanatory Notes (EN) to the Harmonized System, which represent the views of the international classification experts, in EN 85.20 relative to sound recording devices, specifies that "* * * heading covers all sound recording apparatus, whatever the purpose for which it is intended * * * [and] includes sound recording apparatus, incorporating a sound reproducing device."

We next considered the "Goosebumps Talking Bookmark" for which classification in heading 9503 as a toy has been suggested. The importer notes that the article, when exposed to light, by the opening of a book, repeats one of 3 prerecorded short phrases and that the item is packaged and sold as a toy in toy stores. In examining the article we note that its primary function is to serve as a bookmark and that it serves such function at all times. This is the case whether or not the electronic component thereof is operational. It serves that purposes when the book is closed or when the battery no longer supplies power.

While EN 85.43 (13) states that heading 8543 includes electronic music modules, to which the instant sound devices are akin, we note that EN 92.08, also mentions musical mechanism. It states that articles which incorporate a musical mechanism but which are essentially utilitarian or ornamental in function (for example, clocks, miniature wooden furniture, glass vases containing artificial flowers, ceramic figurines) are not regarded as musical boxes within the meaning of this heading. These articles are classified in the same headings as the corresponding articles not incorporating a musical mechanism. Also, articles such as wrist watches, cups and greeting cards containing electronic musical modules are not regarded as goods of this heading. Such articles are classified in the same headings as the corresponding articles not incorporating such modules. In Headquarters Rulings Letter (HRL) 950236, dated June 29, 1992, in connection with the classification of talking door mats, we concluded that the international classification experts hits that the presence of a musical or sound producing device should not control the classification of articles that would normally be classified elsewhere. Further, in connection with the classification of a children's talking storybook and musical greeting card, we noted that the printed paper was indispensable to the functioning of the product and that the integrated circuit, while adding an additional feature to the article, is nevertheless secondary to its functioning and should not control its classification. (HRL 081831, dated May 17, 1989 and HRL 086838, dated July 3, 1990). Numerous Headquarters rulings subsequently issued have reached the same conclusion.

Accordingly, we believe that the bookmark would be classifiable under the provisions for articles of plastic. In this regard, we consulted EN 39.26 which covers Other Articles of Plastics * * *." We noted that "book-marks" is one of the exemplars specifically noted in item (5) thereunder.

Holding:

Hand-held sound record/reproducing devices with limited recording capability and quality of sound are classifiable in subheading 8520.90.0080, HTSUSA, which provides for

magnetic tape records and other sound recording apparatus, whether or not incorporating a sound reproducing device: Other; Other. Such articles are subject to a general rate of duty of 1.6 percent *ad valorem*.

Bookmarks of plastic which play back pre-recorded sounds when exposed to light are classifiable in 3926.10.0000, HTSUSA, which provides for other articles of plastics and articles of other materials of heading 3901 to 3914: Office or school supplies. Articles so classified are subject to general rate of duty of 5.3 percent *ad valorem*.

NYRL A85077 is modified, as set forth above.

In accordance with section 625, this ruling will become effective 60 days from its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

MODIFICATION OF A RULING LETTER INVOLVING THE MARKING OR MUTILATION OF IMPORTED SHIRTS TO BE USED AS SAMPLES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of past ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057, 2186 (1993)), this notice advises interested parties that Customs is modifying a ruling pertaining to the manner in which sample shirts entered duty-free under subheading 9811.00.60, Harmonized Tariff Schedule of the United States, may be marked or mutilated to ensure that they are unsuitable for use other than as samples. Notice of the proposed modification was published July 30, 1997, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after October 24, 1997.

FOR FURTHER INFORMATION CONTACT: Keith B. Rudich, Special Classification and Marking Branch, (202) 482–6980.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On July 30, 1997, Customs published a notice in the CUSTOMS BULLETIN, Volume 31, Number 31, proposing to modify Headquarters Ruling Letter (HRL) 559452 dated February 5, 1996, involving whether a sewn-in label may be used or if marking with an indelible ink pen must be used to designate certain imported shirts as samples eligible for duty-free treatment under subheading 9811.00.60, HTSUS. No comments were received in response to our notice of intent to modify HRL 559452.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057, 2186 (1993)), this notice advises interested parties that Customs is modifying a ruling pertaining to the manner in which imported shirt samples may be marked or mutilated so as to be eligible for duty-free treatment under subheading 9811.00.60, Harmonized Tariff Schedule of the United States ("HTSUS").

Subheading 9811.00.60, HTSUS, provides for the duty-free entry of samples to be used only to solicit orders for products of foreign countries, provided they are valued not over $1 each, or are marked, torn, perforated or otherwise treated so as to render them unsuitable for sale or for use otherwise than as samples.

Guidelines regarding the manner in which imported textile samples which are valued over $1.00 each, should be marked or mutilated so as to render them eligible for duty-free treatment under subheading 9811.00.60, HTSUS, are set forth in Interim Update to Customs Directive 3500–07, Textile Sample Guidelines dated January 4, 1989. These guidelines also set forth more lenient methods for marking imported commercial samples which are not entered duty-free under subheading 9811.00.60, HTSUS. The articles for which the more lenient methods would be preferred include articles to be imported for photographing, modeling and other similar uses, and for which mutilation or the stamping of the word "SAMPLE" would render the article unsuitable for use as a trade sample.

Headquarters Ruling Letter (HRL) 559452 dated February 5, 1996, published in the July 30, 1997, CUSTOMS BULLETIN, concerned whether a sewn-in label may be used or if marking with an indelible ink pen must be used to designate certain imported shirts as samples eligible for duty-free treatment under subheading 9811.00.60, HTSUS. In HRL 559452, Customs incorrectly based its decision allowing the shirts to be marked with a sewn-in label indicating they are "SAMPLE—NOT FOR RESALE" on the more lenient guidelines for the marking of commercial samples which are not entitled to subheading 9811.00.60, HTSUS, treatment. The guidelines generally provide that a wearing apparel sample may receive duty-free treatment under subheading 9811.00.60, HTSUS, only if a section is cut or torn from the garment or it is marked "SAMPLE" in indelible ink or paint.

Therefore, Customs is modifying HRL 559452 to conform to the updated Textile Sample Guidelines by providing that the shirt samples involved in that case will be entitled to subheading 9811.00.60, HTSUS, treatment only if mutilated or marked "SAMPLE" in indelible ink or paint as prescribed in the relevant portion of the guidelines. The modification will further provide that a sewn-in label indicating that the shirts are samples may be used in lieu of mutilation or marking with in-

delible ink or paint, although this option would preclude the shirts from receiving duty-free treatment.

Accordingly, Customs is modifying HRL 559452. HRL 560135 modifying the aforementioned determination is set forth as an Attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: September 9, 1997.

SANDRA L. GETHERS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, September 19, 1997.

CLA–2–05 RR:TC:SM 560135 KR
Category: Classification
Tariff No. 9811.00.60

MS. JANE B. O'DELL
IMPORT MANAGER
EDDIE BAUER
15010 N.E. 36th Street
Redmond, WA 98052

Re: Modification of prior ruling HQ 559452; applicability of subheading 9811.00.60, HTSUS, to sample shirts.

DEAR MS. O'DELL:

This is in reference to a ruling issued to you, HQ 559452 (February 5, 1996), concerning die acceptable marking of "SAMPLE" on shirts in order to be eligible for treatment under subheading 9811.00.60, Harmonized Tariff Schedule of the United States (HTSUS). You submitted three samples of shirts for our review.

Facts:

According to the facts set forth in HQ 559452, Eddie Bauer intended to import sample garments for various purposes including: quality control testing, design and development, specification approval, and photography for catalog and advertising. You stated that the appearance of the samples is often critical, particularly for photography and advertising purposes. Although you advised that the imported samples are generally marked with a textile marking pen, there are certain garments which you believe are either transparent or of a sufficiently light color that the indelible marking pen ink will bleed through the fabric and damage the sample for some of the necessary uses, such as photographing. You asked whether a sewn-in label indicating that the garments are samples may be used on such transparent and light colored articles.

In HQ 559452, Customs cited to the Interim Update to Customs Directive 3500–07, Textile Sample Guidelines, and determined that the three sample shirts submitted may properly be marked with a sewn-in label indicating that they are a "SAMPLE—NOT FOR RESALE" and be eligible for duty-free treatment under subheading 9811.00.60, HTSUS.

After further review of this matter, we have determined that the holding in HQ 559452 is incorrect.

Issue:

Whether a sewn-in label may be used or if marking with an indelible ink pen must be used to designate an imported garment as a sample for treatment under subheading 9811.00.60, HTSUS.

Law and Analysis:

Subheading 9811.00.60, HTSUS, provides for the free entry of articles used in the U.S. as samples only to solicit orders for products of foreign countries, provided they are valued not over $1.00 each, or are marked, torn, perforated or otherwise treated so as to render them unsuitable for sale or for use otherwise than as samples. *See* HQ 558978 (March 30, 1995); HQ 556138 (November 18, 1991); HQ 557013 (March 19, 1993).

With regard to those samples which are valued over $1.00, the issue is the nature of the mark, tear, perforation, or other treatment which will comply with the statute. To meet the requirements of the statute, the mark, tear, perforation, or other treatment must alter items and make them unsuitable for commercial sale, while at the same time, preserve their usefulness as samples.

Guidelines regarding the manner in which textile samples should be marked or otherwise treated to render them eligible for duty-free treatment under subheading 9811.00.60, HTSUS, are set forth in Interim Update to Customs Directive 3500–07, Textile Sample Guidelines, dated January 4, 1989. *See* HQ 559079 (July 7, 1995); HQ 555875 (May 8, 1991); HQ 556138 November 18, 1991). These guidelines provide as follows for marking of wearing apparel.

> A) A section may be cut or torn from the main body of the garment. This cut must be on the outside of the garment and visible and should not be on a seam or border. The size of the cut or tear should be at a minimum of 2 inches in length,
>
> B) The item may be marked with the word "SAMPLE" in indelible ink or paint. The size of the word "SAMPLE" should be at least 1 inch in height and not less than 2 inches in length.
>
> The word "SAMPLE" should be placed in a prominent area of the garment which will be visible when worn and in a contrasting color to the garment.
>
> The definition of an indelible marking is that which is incapable of being erased or obliterated. Markings in chalk or white-out are two types of markings that do not meet that definition.
>
> For items A and B above, Customs officers are authorized to allow smaller markings or cuts for garments which, in their opinion, do not meet the suggested sizes, i.e., infant wear.
>
> C) A hole or section may be punched or cut into a garment on the outside in a prominent area of at least 1 inch in diameter or approximately the size of a U.S. quarter and in a location where it cannot be covered by a patch or an emblem.

The Textile Sample Guidelines also include more lenient guidelines for marking garments as samples to be entered for photographing; modeling, and other similar uses. However, these more lenient guidelines are applicable only to treatments which are *not* classifiable under subheading 9811.00.60, HTSUS, and are therefore *not* exempt from duty. These guidelines, which were cited in HQ 559452, provide as follows:

> WEARING APPAREL
>
> a) The inside of the garment must be indelibly stamped with the word "SAMPLE". This stamp must be in contrasting color to the article and near the country of origin label, in one (1) inch or greater letters and physically placed on the article itself.
>
> b) The following guidelines are provided for apparel which is transparent or incapable of being marked (i.e., briefs, bikinis, hosiery, sheer or very thin garments, etc.) and for which the stamping of "SAMPLE" would render the article unsuitable for use as a trade sample:
>
> > Fabric labels, not smaller than 2½" by ½" containing the words "SAMPLE—NOT FOR RESALE" must be conspicuously and permanently affixed to the article in close proximity to the country of origin label. Labels that are loosely placed on a garment, or that can be easily removed will disqualify the entire shipment from being eligible for properly marked commercial sample treatment.
>
> It must be understood that option (b) can only be used when option (a) is not applicable. This is not an either/or proposition. Under no circumstances can a label be used

> when a garment can be properly marked with an indelible stamp. The burden of proof lies with the importer to show that a stamp would make a garment unsuitable for modeling or photographing purposes.

The guidelines further provide as follows:

> The provisions for properly marked commercial samples were developed to allow an option or more lenient method for samples to be entered for photographing, modeling, etc. This was done to allow these articles to enter without mutilation or marking required under 9811.00.60 which might otherwise cause the article to be of little use for such photography or modeling purposes.
>
> Properly marked [c]ommercial samples, which are not classifiable under * * * 9811.00.60, from all countries, * * * are not exempt from duty and may be entered on informal entry (including formal mail entry) * * *.
>
> * * * * * * *

The three sample shirts that were submitted in connection with HRL 559452 were each marked "SAMPLE" on the interior of the garment with an indelible marker, two in black ink and one in yellow ink. In each of the garments, the ink bled through so that the ink was visible on the exterior of the garment. Each of these three garments was of a white or 'bone' color. Pursuant to the above guidelines relating to the marking of commercial samples which are not classifiable in subheading 9811.00.60, HTSUS, we find that the three garments may properly be marked with a sewn-in label indicating they are a "SAMPLE—NOT FOR RESALE". However, if the sewn-in label is used, the shirts will not be eligible for duty-free treatment under subheading 9811.00.60, HTSUS.

It is Customs position that in order for textile wearing apparel to be considered as "unsuitable for sale or for use otherwise than as a sample," for purposes of duty-free treatment under subheading 9811.00.60, HTSUS, it must be either marked, "SAMPLE", in indelible ink or paint (as submitted) or cut or torn in the manner described in the above guidelines relating to the treatment of textile samples entered under subheading 9811.00.60, HTSUS.

Holding:

Based on the information submitted, the three sample shirts which are valued over $1.00 each, may not be entered duty-free under subheading 9811.00.60, HTSUS, if they are merely marked with a sewn-in label indicating that they are a "SAMPLE—NOT FOR RESALE" pursuant to the textile marking guidelines. In order to be eligible for duty-free entry under subheading 9811.00.60, HTSUS, the shirts must be marked "SAMPLE", in indelible ink or paint or cut or torn in the manner prescribed in the Interim Update to Customs Directive 3500–07, Textile Sample Guidelines, dated January 4, 1989. HQ 559452 is modified accordingly.

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is entered. if the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

SANDRA L. GETHERS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

PROPOSED MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF ANTHRACITE/ GRAPHITE COMPOSITE AND GRAPHITIC CATHODE BLOCKS

AGENCY: U.S. Customs Service, Department at the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling letter pertaining to the tariff classification of anthracite/graphite composite and graphitic cathode blocks. Customs invites comments on the correctness of the proposed modification.

DATE: Comments must be received on or before October 24, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue, NW, (Franklin Court), Washington, D.C. 20229. Comments submitted may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, D.C,

FOR FURTHER INFORMATION CONTACT: David W. Spence, Attorney-Advisor, Tariff Classification Appeals Division, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling letter pertaining to the tariff classification of anthracite/graphite composite and graphite cathode blocks. Customs invites comments on the correctness of the proposed modification.

In NY 877860, issued on May 5, 1993, Customs ruled that a certain style of graphitic cathode block (HC10) with a crystallinity percentage of 93.8% was classifiable under subheading 6902.90.10, Harmonized Tariff Schedule of the United States (HTSUS), as other refractory brick, and that two other styles of anthracite/graphite composite cathode blocks (HC3 and HC5) with crystallinity percentages of 52.9% and 63.3% were classifiable under subheading 8545.90.40, HTSUS, as other articles or graphite or other carbon, with or without metal, of a kind used for electrical purposes. NY 877860 is set forth in "Attachment A" to this document

It is now Customs position that the standard used in NY 877860 to determine what constitutes "substantially crystalline" is incorrect, and the HC3 and HC5 styles of cathode block meet the term "substantially cystalline" and are classifiable with style HC10 under subheading 6902.90.10, HTSUS.

Customs intends to modify NY 877860 to reflect the proper classification at style nos. HC3 and HC5 under subheading 6902.90.10, HTSUS. Before taking this action, we will give consideration to any written comments timely received. Proposed Headquarters ruling 960671 modifying NY 877860, is set forth as "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: September 5, 1997.

MARVIN M. AMERNICK,
(for John Durant, Director.
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, May 5, 1993.

CLA–2–85:S:N:N7:236 877860
Category: Classification
Tariff No. 6902.90.1020 and 8545.90.4000

MS. NINA R. LIPTON
ASSISTANT MANAGER
TRAFFIC & ADMINISTRATION
PECHINEY WORLD TRADE (U.S.A.), INC.
500 Plaza Drive
Secaucus, NJ 07096

Re: The tariff classification of *Cathode Blocks* from France.

DEAR MR. LIPTON:

In your letter dated August 20, 1992 you requested a tariff classification ruling.

The prospective imports, Cathode Blocks will be anthracite/graphite composites and graphitic blocks covering style numbers HC3, HC5 and HC10.

Representative sizes are:

(1) 20″ x 18″ x 115″ (2) 15″ x 26″ x 80″ (3) 14″ x 18″ x 60″ (4) 14″ x 18″ x 30″

These blocks are used to line the bottom of an aluminum reduction cell which produces aluminum metal by electrolysis. Samples of the above style numbers were forward to the United States Customs Laboratory with the following results:

Sample	*Percent Crystallization*	*Composition*
HC3	52.9	Anthracite-graphite
HC5	63.3	Anthracite-graphite
HC10	93.8	Graphitic

For the purpose of chapter 69, a *"ceramic article"* is a shaped article having a glazed or unglazed body of crystalline or substantially crystalline structure, the body of which is composed essentially of inorganic nonmetallic substances and is formed and subsequently hardened by such heat treatment that the body, if reheated to pyrometric cone 020, would not become more dense, harder, or less porous, but does not include any glass articles.

A crystalline or *substantially crystalline* structure was defined by written direct testimony obtain in the *Eastalco Aluminum Co. v. United States* (Court No. 83–01–00095). It was determined "that in order for the carbon blocks to even approach the behavior of crystalline material, there must be very substantial amounts, e.g. 70% or more crystalline material present." Customs adopts this definition of "substantial" as it pertains to the crystallization of Cathode Blocks.

The applicable subheading for the *Cathode Blocks* Style # HC3 and HC5 will be 8545.90.4000, Harmonized Tariff Schedule of the United States (HTS), which provides for carbon electrodes, carbon brushes, lamp carbons, battery carbons and other articles of graphite or other carbon, with or without metal, of a kind used for electrical purposes, other. The rate of duty will be 4.9 percent *ad valorem*.

The applicable HTS subheading for *Cathode Blocks*, Style # HC10 will be 6902.90.1020, which provides for refractory bricks, blocks, tiles and similar refractory ceramic construction goods, other than those of siliceous fossil meals or similar siliceous earths, other, other. The rate of duty will be free.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

RR:TC:MM 960671 DWS
Category: Classification
Tariff No. 6902.90.10

ASSISTANT MANAGER, TRAFFIC & ADMINISTRATION
PECHINEY WORLD TRADE (U.S.A.). INC.
500 Plaza Drive
Secaucus, NJ 07096

Re: Reconsideration of NY 877860; Anthracite/Graphite Composite and Graphitic Cathode Blocks; Chapter 69, Additional U.S. Note 1; Substantially Crystalline; *Eastalco Aluminum v. U.S. (Eastalco I, II, and III);* 955718; 8545.90.40.

DEAR SIR/MADAM:

On May 5, 1993, Customs issued NY 577860 to Pechiney World Trade (U.S.A.) Inc., concerning the classification of certain anthracite/graphite composite and graphitic cathode blocks under the Harmonized Tariff Schedule of the United States (HTSUS). We have since had reason to reconsider the holding in NY 877860, and this letter contains our review of that decision.

Facts:

The merchandise which was the subject of NY 877860 consists of cathode blocks (style nos. HC3, HC5, and HC10) made of anthracite/graphite composites and graphite. Representative sizes of the cathode blocks are as follows: 20 in. x 18 in. x 115 in.; 15 in. x 26 in. x 80 in.; and 14 in. x 18 in. x 30 in. The blocks are used to line the bottom of an aluminum reduc-

tion cell which produces aluminum metal by electrolysis. Samples of the blocks were forwarded to the U.S. Customs Laboratory, and it was determined that the subject three styles had the following percentages of crystalline composition: HC2–52.9% anthracite/graphite; HC5–63.3% anthracite/graphite; and HC10–93.8% graphite.

Issue:

Whether the cathode blocks meet the term "substantially crystalline" for tariff purposes and are classifiable under subheading 6902.90.10, HTSUS, as other refractory bricks, or under subheading 8545.90.40, HTSUS, as other articles of graphite or other carbon, with or without metal, of a kind used for electrical purposes.

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that classification is determined according to the terms of the headings and any relative section or chapter notes.

The subheadings under consideration are as follows:

> 6902.90.10: [r]efractory bricks, blocks, tiles and similar refractory ceramic constructional goods, other than those of siliceous fossil meals or similar siliceous earths: [o]ther: [b]ricks.
>
> Goods classifiable under this provision receive duty-free treatment.
>
> 8545.90.40: [c]arton electrodes, carbon brushes, lamp carbons, battery carbons and other articles of graphite or other carbon, with or without metal, of a kind used for electrical purposes: [o]ther: [o]ther.
>
> The general, column one rate of duty for goods classifiable under this provision is 2 percent *ad valorem*.
>
> Chapter 69, additional U.S. note 1, HTSUS, states that:
>
> [f]or the purposes of this chapter, a *"ceramic article"* is a shaped article having a glazed or unglazed body of crystalline or substantially crystalline structure, the body of which is composed essentially of inorganic nonmetallic substances and is formed and subsequently hardened by such heat treatment that the body, if reheated to pyrometric cone 020, would not become more dense, harder, or less porous, but does not include any glass articles.

Thus, if a cathode block does not possess a substantially crystalline structure, it is not a ceramic article and is precluded from classification in chapter 69, HTSUS. In NY 877880, Customs adopted the standard of "70 percent or more crystalline material present" in a cathode block to meet the definition of "substantially crystalline". Because HC10 was the only block to meet that standard (93.8%), it was classifiable under subheading 6902.90.10, HTSUS, and HC3 and HC5 were held to be classifiable under subheading 8545.90.40, HTSUS.

The three relevant court cases dealing with the classification of cathode blacks are as follows: *Eastalco Aluminum Co. v. U.S.*, 10 CIT 622 (1988) *(Eastalco) Eastalco Aluminum Co. v. U.S.*, 13 CIT 864 (1989) *(Eastalco II), and Eastalco Aluminum Co. v. U.S.*, 916 F.2d 1565 (1990) *(Eastalco III). See* HQ 955718, dated October 4, 1994, for an overview of *Eastalco I, II, and III.*

The standard set in NY 877860 was adopted from *Eastalco II*, which was cited in the ruling letter. However, such a standard was taken from testimony in the case and was not part of the holding in *Eastalco II*. Therefore, that standard should not be determinative as to what meets the "substantially crystalline" test.

In *Eastalco III*, the merchandise at issue was carbon blocks used to line an aluminum reduction cell, and the blocks had a crystalline content of 5%, more or less 1%. The Court did not establish a standard defining "substantially crystalline" but did state that:

> [i]n light of the uncontested evidence that the blocks in question have at most a crystalline content of 6% and the admission by Eastalco's expert that this percentage of crystallinity is inconsistent with being labeled "substantially crystalline" in the trade, we cannot find that the court erred * * *

Therefore, even though the Court did not establish a standard, they held that a block having a crystalline content of 6% could not qualify as being "substantially crystalline" for tariff classification purposes.

In HQ 955718, Customs ruled on merchandise which consisted of graphite cathode blocks with a crystalline content between 50% and 70%. in holding that the blocks qualified as "substantially crystalline" we stated that:

> [t]he Courts in *Eastalco II* and *Eastalco III* determined that a low amount of crystalline content, i.e., 6%, was not enough to meet the requirement of "substantially crystalline." We are of the opinion that none of the Courts in the *Eastalco* cases determined the exact percentage of crystallinity necessary for an article to meet the definition of "ceramic" for tariff classification purposes * * *. As the subject graphite cathode blocks are between 50% and 70% crystalline, they are not to be classified as the blocks were in the *Eastalco* cases. Based on the information before this office, we are of the opinion that the graphite cathode blocks are "substantially crystalline" and, therefore, meet the definition of a ceramic article and are classifiable within Chapter 69, HTSUS.

In HQ 955718, we did not set a standard 50% or above of crystalline content. We merely determined that the merchandise, which had a crystalline content of between 50% and 70%, was distinguishable from the merchandise in the *Eastalco* cases and qualified as "substantially crystalline".

In *Eastalco III*, we note that the Court also stated that:

> [t]he definition of "ceramic articles" specifically excludes any glass article from its scope. The primary distinction between the ceramic articles * * * and glass articles * * * is that glass is essentially noncrystalline in structure whereas ceramic ware is essentially crystalline.

Therefore, the purpose of the term "substantially crystalline" is to preclude glass from classification in chapter 69, HTSUS.

As the standard in NY 877860 was wrongly applied, and because no other Customs ruling or court case sets a standard for determining what is "substantially crystalline" we must make a decision concerning the application of the term "substantially crystalline". Obviously, because each piece of merchandise may have differing percentages of crystallinity, classification of such products must be decided on a case-by-case basis. For review, the Court in *Eastalco III* stated that crystallinity of 6% or less is not substantial but did not decide on percentages any higher than 6%, and we have held in HQ 955718 that graphite cathode block with a crystalline content of at least 50% met the "substantial crystalline" test. Therefore, it is our position that cathode block with a crystalline content of 6% percent and under does not meet the ["ubstantially crystalline" test, and cathode block with a crystalline content of 50% or above does meet the "substantially crystalline" test. Classification of cathode block with a crystalline content between 6% and 50% will have to be dealt with on a case-by-case basis utilizing laboratory reports, etc. Such a guideline should be used unless a court rules differently.

Therefore, because styles HC3 and HC5 possess crystallinity percentages above 50%, they are described under subheading 6902.90.10, HTSUS, with style HC10.

We must now determine whether carbon cathode blocks which are used for lining aluminum reduction cells are described under subheading 8545.90.40, HTSUS, as other articles of carbon.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes, although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989). In part, Explanatory Note 85.45 (p.1522) states that:

> [t]his heading covers all articles of graphite or other carbon which are recognisable by their shape, dimensions or otherwise, as being for electrical purposes, whether or not they contain metal * * *.

In HQ 955718, which dealt with the classification of graphite cathode blocks used to line the bottom of aluminum reduction furnaces, we stated that:

> * * * we are of the opinion that the graphite cathode blocks are not principally used for electrical purposes. They are used for electrical purposes during the short startup period of the furnace or cell. Thereafter and for the greater period of their useful life, they serve predominately as a refractory article. This conclusion is supported by the Court in *Eastalco II* which stated that the "* * * electrical properties, by themselves, did not make the refractory brick designation inappropriate." Therefore, as the graphite cath-

ode blocks are not principally used for electrical purposes, they are not classified under subheading 8545.90.40, HTSUS.

As with the cathode blocks in HQ 955718, it is our understanding that the subject cathode blocks are not principally used for electrical purposes, but serve predominately as refractory articles. Therefore, the blocks are precluded from classification under subheading 8545.90.40, HTSUS.

Because the cathode blocks are not more specifically provided for in the HTSUS, they are classifiable under subheading 6902.90.10, HTSUS.

Holding:

The cathode blocks meet the term "substantially crystalline" for tariff purposes and are classifiable under subheading 6902.90.10, HTSUS, as other refractory bricks.

Effect on Other Rulings:

NY 877860 is modified to reflect the holding of this ruling.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
R. Kenton Musgrave
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Dominick L. DiCarlo

Nicholas Tsoucalas

Clerk

Raymond F. Burghardt

Decisions of the United States Court of International Trade

NOTE: This is to advise that Slip Op. 97–120 is not available for publication at this time due to the confidential nature of the document. A public version of the document will be released and published in the Customs Bulletin when available.

(Slip Op. 97–120)

QUEEN'S FLOWERS DE COLUMBIA, ET AL., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND FLORAL TRADE COUNCIL, DEFENDANT-INTERVENOR

Court No. 96–08–01921

(Dated August 25, 1997)

(Slip Op. 97–121)

FORD MOTOR CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 92–03–00164

Plaintiff moves for summary judgment pursuant to U.S. CIT R. 56 challenging the United States Customs Service's ("Customs") assessment of duties at the rate of twenty-five percent *ad valorem* under Items 692.02 and 945.60 of the Tariff Schedules of the United States ("TSUS") on eleven entries of foreign engines and transmissions imported and installed in trucks by plaintiff in a Foreign Trade Subzone. Plaintiff seeks to recover $5,000,000 in excess duties paid to Customs, asserting a mistake committed by plaintiff's employee in designating the status of the entries at issue as "Non-Privileged Foreign" instead of "Privileged Domestic" caused plaintiff to pay more duties than were actually due. Alternatively, plaintiff argues the entries at issue became liquidated by operation of law "as entered" because neither plaintiff nor its surety received notices of extensions of liquidation covering the entries from the Customs Service.

Defendant also moves for summary judgment pursuant to U.S. CIT R. 56, arguing plaintiff is not entitled to the lower duty rate and plaintiff has not presented sufficient evidence to establish that it did not receive the extension notices.

Held: Plaintiff's Motion for Summary Judgment is denied and defendant's Motion for Summary Judgment is granted.

(Dated August 29, 1997)

Stein, Shostak, Shostak & O'Hara (S. Richard Shostak); Ford Motor Company (C. Harry Gibson), for plaintiff.

Frank W. Hunger, Assistant Attorney General of the United States; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, *A. David Lafer,* Senior Trial Counsel, *(Michael S. Kane); Joseph I. Liebman,* Attorney in Charge, International Trade Field Office *(Amy M. Rubin); Sheryl French,* Attorney-Advisor, Office of the Assistant Chief Counsel, United States Customs Service, of counsel, for defendant.

OPINION

CARMAN, *Chief Judge:* Before this Court are cross-motions for summary judgment pursuant to U.S. CIT R. 56 regarding the assessment of duties by the United States Customs Service ("Customs") at the rate of twenty-five percent *ad valorem* under Items 692.02 and 945.60 of the Tariff Schedules of the United States ("TSUS")[1] on certain engines and transmissions imported and installed by plaintiff Ford Motor Company ("Ford") in trucks in a Foreign Trade Subzone ("FTSZ" or "FTZ"). The trucks were entered in eleven consumption entries, which were filed at the Port of Louisville by Ford as importer of record between December 30, 1985 and February 7, 1986. This Court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (1988).

BACKGROUND

A. *Louisville Foreign Trade Subzone:*

In the early 1980's, Ford announced plans to operate in a FTSZ in Louisville, Kentucky, which would encompass a motor vehicle assembly plant it operated there, to assemble imported engines and transmissions into both trucks and automobiles. In its Louisville plant, Ford assembled both passenger cars (Bronco II's) as well as trucks (Rangers) using the same assembly line, but the duty rates corresponding to the completed cars and trucks were different. Ford's rationale for operating in the Louisville FTSZ was to take advantage of Customs laws and regulations that would enable Ford to minimize the duties paid on imported engines and transmissions assembled into both cars and trucks.

The existing duty rate in 1985–86 for completed passenger cars was 2.6% *ad valorem* under Item 692.10, TSUS. The existing duty rate at that time for imported engines and transmissions was 3.3% *ad valorem* under Item 660.48, TSUS for engines and under Item 692.32, TSUS for transmissions. The existing duty rate in 1985–86 for completed trucks was 25% *ad valorem* under Item 945.69, TSUS.

With respect to cars assembled in the FTSZ, the duty rate applicable to completed cars in which imported engines and transmissions were assembled was lower than the duty rate applicable to the imported engines and transmissions entered as parts. In order to take advantage of the lower rate applicable to completed cars, Ford had to select "Non-Privileged Foreign" ("NPF") status on the Customs 214 Forms when the en-

[1] The Tariff Schedules cited in this opinion are those applicable to entries made in the years 1985–1986.

gines and transmissions to be assembled into cars entered the FTSZ. When "NPF" status was selected for these engines and transmissions, Ford would not pay duties on the entered parts until they were assembled into completed cars. Thus, Ford had an incentive to enter engines and transmissions destined for cars in "NPF" status.

In contrast, the duty rate applicable to completed trucks was substantially higher than the duty rate applicable to engines and transmissions for trucks which were entered as parts. Because a single assembly line located in Ford's Louisville FTSZ operation produced both completed cars and trucks simultaneously using the same imported parts, Ford had to claim "NPF" status for the engines and transmissions to be assembled into completed cars, while simultaneously ensuring the engines and transmissions for trucks were not placed in "NPF" status. Rather, Ford intended to select "Privileged Domestic" ("PD") status for the engines and transmissions which entered the FTSZ destined for use in trucks. By selecting "PD" status, Ford could pay the lower component duty rate up front before the engines and transmissions entered the FTSZ and thus reduce somewhat the duties on the finished truck. The imported engines and transmissions assembled into finished trucks in the FTSZ would be assessed lower duties corresponding to the parts rate when they were entered into the commerce of the United States, enabling Ford to avoid paying duties at a higher rate when the completed trucks entered the United States. Engines and transmissions which entered the Louisville FTSZ in "PD" status were thus non-dutiable because all duties had been paid on these parts upon their entry into the United States and before they entered the FTSZ.[2]

Accordingly, in order to pay the lowest possible duty rate on the imported engines and transmissions, Ford had to claim "NPF" status for engines and transmissions assembled into completed cars, which had a lower duty rate than for unassembled parts, while simultaneously ensuring that engines and transmissions assembled into completed trucks were not placed in "NPF status," which would make them dutiable at a higher rate for finished trucks. Ford intended to enter the engines and transmissions for trucks in "PD" status. Under these circumstances, the operation of the FTSZ was a complicated venture.

In late 1984, prior to activating the FTSZ, Ford appointed Mr. Moe Tullock as the FTSZ Coordinator or Agent at Louisville. Mr. Tullock was instructed that when foreign transmissions and engines for use in manufacturing trucks were entered into the FTSZ, he was to pay duties on the parts *before* they entered the FTSZ at the 3.3% *ad valorem* rate applicable to transmissions and engines, and thereafter designate the

---

[2] Alternatively, Ford could have obtained the lower component duty rate when the finished trucks left the FTSZ by selecting "Privileged Foreign Status" ("PFS") on the Customs 214 Forms for the engines and transmissions. Defendant indicates, however, "PFS" was impracticable for Ford and, as a matter of policy, Ford did not use "PFS" status. (Def.'s Mot. for Summ. J. ("Def.'s Br.") at 5 n. 3 (*citing* Anderson Dep. at 136–38, 207–08).) With respect to the entries at issue, Ford explained "Mr. Tullock was instructed *in no uncertain terms* that when foreign transmissions and engines to be used in trucks were to be entered into the FTSZ, he was to pay duties on them, before they entered the FTSZ, at the 3.3% *ad. val.* duty rate applicable to transmissions and engines. Thereafter he was to designate them as "Privileged Domestic" (PD) on the Customs 214 Forms." (Pl.'s Mem. in Supp. of Mot. for Summ. J. ("Pl.'s Br.") at 8.)

entries as "PD" on the Customs 214 Forms. (*See* Pl.'s Mem. in Supp. of Mot. for Summ. J. ("Pl.'s Br.") at 8.) This treatment made it possible to avoid paying the 25% *ad valorem* rate when the parts left the FTSZ and entered the United States in completed trucks. Instead, when the completed trucks left the FTSZ, having already paid duties on the engines and transmissions, Ford would be entitled to enter the engines and transmissions duty-free. Mr. Tullock was similarly instructed that with respect to parts to be used in the assembly of automobiles, he was to declare them as "NPF" and pay no duty on them until they left the FTSZ incorporated in completed cars. At that point, the parts would be dutiable at the 2.6% *ad valorem* rate applicable to finished automobiles.

Under Customs regulations, an importer was required to separately maintain both "NPF" and "PD" merchandise located within the FTSZ, and Ford was responsible for ensuring that it remained in compliance with applicable United States Customs requirements and regulations. Customs advised Ford to keep domestic and imported parts separate and to maintain inventory records tracking all parts that entered the FTSZ, especially tracking those parts Ford paid duty on and those it did not. Before the initiation of operations in the FTSZ, Ford proposed an inventory control methodology using the "first-in-first-out" system, but this proposal was rejected by Customs.

B. *Eleven Entries Made Between December 1985 and February 1986:*

In the beginning of January 1986, Mr. Tullock experienced difficulty with his supervision of the FTSZ. He failed to pay duties on engines and transmissions to be incorporated into trucks before they entered the FTSZ and erroneously designated them as "NPF" on the Customs 214 Forms. The eleven entries at issue in this case were prepared by Mr. Tullock and filed with Customs during the period December 1985 through early February 1986. The entries at issue described the subject merchandise as "transmissions for trucks" or "engines for trucks" as opposed to completed trucks and entered the engines under TSUS 660.48 and the transmissions under TSUS 692.32 at a duty rate of 3.3% *ad valorem*. Duties were not paid on the parts before they entered the FTSZ, and the parts were designated as "NPF" instead of as "PD" on the Customs 214 Forms. The documents detailing the eleven entries were replete with errors, including incorrect product descriptions, duty rates and tariff item numbers. In his affidavit, Mr. Tullock testified that he suffers from a medical condition that resulted in a complete loss of memory with respect to the circumstances surrounding the entries. Mr. Tullock stated

> I have no explanation as to exactly how the wrong foreign trade zone status designation was placed on the form 214. I was aware that the intent of the operation was to pay a duty rate of 3.5% on parts used for Ranger production. I felt at the time I had been trained in the proper preparation of the documentation, and was unaware that documentation as submitted would fail to achieve this end.

> I first became aware of the wrong foreign-trade zone status designation on the CF 214 forms when Ford Deaborn Headquarters officials came to Louisville to assist me and identified the problem. Up until that time, I had believed that with the assistance of the local Customs officials and our Customhouse broker that all details of the operation has been handled appropriately.

(App. to Pl.'s Br. ("Pl.'s App.") Ex. 3 at 1–2.)

At some point in late January or early February 1986, Ford met with a Customs import specialist in Ohio and disclosed the errors made in entering the engines and transmissions into the Louisville FTSZ. Ford representatives requested the import specialist allow them to amend the entry documents, but the import specialist advised Ford such amendments were not permitted by the United States Customs laws and regulations. In mid-February 1986, Ford discontinued its operations in the Louisville FTSZ.

C. *Liquidation and Protest:*

The eleven entries subsequently were liquidated on December 1, 1989 with duties assessed at the rate of 25% *ad valorem*. Additional duties amounting to more than $5 million were assessed because Ford's election of "NPF" status for the truck parts imported in the entries resulted in the application of a 25% *ad valorem* rate for finished trucks under TSUS Items 692.02 and 945.69 for those parts instead of the 3.3% *ad valorem* duty rate on entered truck parts. Two of these entries were subsequently reliquidated in February 1990 to make minor corrections. Ford timely protested the liquidations and ultimately paid the additional duties assessed.

D. *Extension Notices:*

Customs claims it sent Ford and its surety a total of sixty-six Notices of Extension of Liquidation (three notices to Ford and three to its surety for each of the eleven entries, a total of thirty-three to each) in 1986, 1987 and 1988. Customs claims it sent all required notices to Ford and its surety, and its records show that the last of the extension notices in this case was mailed to Ford on or about October 22, 1988, two months before Ford's Customs Department moved to a new location. Customs cannot identify the person who mailed the notices and does not keep a hard copy of the notices or send them by registered or express mail.

The Chief of the Entry Control Processing Branch, a branch within the Commercial Systems Division of Customs, explained that Customs maintains a computerized database called the Automated Commercial System ("ACS"), which tracks and processes every Customs entry made, containing information with respect to each entry on matters such as liquidation, billing and payment of duties, and extensions of the time to liquidate and suspension of liquidation. (*See* Declaration of Arthur Versich at 1 (*reprinted in* Def.'s App. at 172–77).) Mr. Versich explained that once data regarding an extension of liquidation is entered into ACS, the extension notice is automatically scheduled to be printed on the following weekend, as part of Customs' "end-of-week" processing, and notices

of extension are formatted and printed by computer onto Customs Form 4333A. (*Id.* at 2.) Based on his knowledge of the notice system and his experience as a former import specialist, Mr. Versich concluded "that 66 notices were issued on an appropriate basis each time, and the notices were properly addressed and timely printed and mailed." (*Id.* at 4.) Additionally, Roger Odom, the Supervisor for Customs' Computer Operations and Production Management Section, who was responsible for computer operations at Customs' Data Center, explained that after the notices are printed and addressed by computer, they are removed by an operator and placed in plastic trays provided by the Postal Service, and are picked up by the Postal Service within twenty-four hours of printing. (*See* Declaration of Roger Odom at 4 (*reprinted in* Def.'s App. at 178–82).)

Ford and its surety deny ever receiving any of the sixty-six notices. A section supervisor of Ford's Customs Department testified in his deposition that an extensive two month search of all of Ford's customs records was undertaken in early 1990 to locate the notices, but none was found.

E. *Stay Pending Decision in Intercargo:*

Oral argument was held in this case in January 1995. This case, however, was subsequently stayed on the application of the plaintiff pending a final decision by the Court of Appeals for the Federal Circuit ("Federal Circuit") in *Intercargo Ins. Co. v. United States*, 879 F. Supp. 1338 (CIT 1995), *rev'd*, 83 F.3d 391 (Fed. Cir. 1996), *cert. denied*, 117 S.Ct 943, 136 L.Ed.2d 832 (1997) *("Intercargo").* Prior to this case being stayed, and six months after the parties filed cross Motions for Summary Judgment, Ford sought, and was granted, leave to amend its complaint to assert a claim that, assuming the alleged notices of extension were sent to Ford and its surety, the language of the extension notices was statutorily inadequate. *See Ford Motor Company v. United States*, 896 F. Supp. 1224 (CIT 1995). Ford argued the language included in defendant's notices of extension of liquidation was the same standard generic language held to be invalid in *Intercargo* and therefore did not comply with the statutory requirements in 19 U.S.C. § 1504(b). After the Federal Circuit reversed *Intercargo*, the stay in this case continued, pending the United States Supreme Court's decision whether to grant certiorari on *Intercargo*. The Supreme Court denied certiorari in *Intercargo*.

Defendant asserts the Federal Circuit's *Intercargo* decision and the denial of certiorari by the Supreme Court effectively has mooted Ford's claim that the language contained in the notices extending the time for liquidation of its merchandise rendered the notices ineffective. Ford acknowledges its amended claim that the language of the extension notices alone made them "fatally flawed" has been mooted by *Intercargo*. However, Ford continues to maintain its argument the notices were invalid, asserting they were not obtained for a statutorily valid reason and therefore are not affected by the holding in *Intercargo*. After the Supreme Court denied certiorari, the parties requested, and this Court granted, an opportunity to address the impact of *Intercargo* and any oth-

er relevant cases that had been decided since this matter was stayed. The case is now before this Court for a decision.

STANDARD OF REVIEW

This case is before the Court on cross-motions for summary judgment. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." U.S. CIT R. 56(d). "The Court will deny summary judgment if the parties present 'a dispute about a fact such that a reasonable trier of fact could return a verdict against the movant.'" *Ugg International, Inc. v. United States*, 17 CIT 79, 83, 813 F. Supp. 848, 852 (1993) (citation omitted). Both parties in this case agree there are no genuine issues of material fact which would prevent this Court from deciding this action on the basis of the pending motions for summary judgment. (Pl.'s Br. at 18; Def.'s Mot. for Summ. J. ("Def.'s Br.") at 1.) Because the issues remaining in this case are legal in nature, the Court concludes the parties' conflict raises questions of law which the Court may properly resolve by summary judgment. *See, e.g., Aviall of Texas v. United States*, 18 CIT 727, 729, 861 F. Supp. 100, 103 (1994).

CONTENTIONS OF THE PARTIES

A. *Plaintiff:*

Ford argues its failure to pay duties on the imported transmissions and engines assembled into trucks before their entry into the Louisville FTSZ and the election of "NPF" status for these articles, rather than "PD" status on the Customs 214 Forms "were the result of 'clerical errors, mistakes of fact and/or other inadvertances,' which are correctable under 19 U.S.C. § 1520(c)(1)." (Pl.'s Br. at 3.) Ford also argues the sixty-six notices of extension of liquidation of the eleven entries "were never received by FORD or by its surety" and therefore the entries must be deemed liquidated "'as entered' *as a matter of law*, long before December 1, 1989, when the Customs Service 'liquidated' them." *(Id.)* Under these circumstances, Ford maintains, the Court should hold the 1989 liquidations and their increased duty assessments are illegal, null and void. Finally, Ford contends the "alleged" extensions were also invalid and illegal "because the reasons for the extensions were never *specifically* disclosed to FORD, and, as now identified, they are not authorized by the statutes or by the regulations." *(Id.)*

B. *Defendant:*

Defendant argues even assuming Ford intended to enter the merchandise with "PD" status, "Ford cannot obtain relief pursuant to 19 U.S.C. § 1520(c)(1) because Ford's failure to pay duty on this merchandise prior to the entry of the merchandise into the FTZ amounted to an error in the 'construction of law.'" (Def.'s Br. at 15.) Defendant argues Ford did not comply with inventory control and record-keeping requirements applicable to "PD" merchandise and "[i]t would be perverse to al-

low Ford to obtain favorable treatment for which Ford would not be entitled even if Ford had properly completed the entries and [Customs 214 Forms]." (*Id.* at 16.)

Defendant asserts the two Ford employees[3] who supervised the initiation of the FTSZ operated under the fundamental misunderstanding that the engines and transmissions could not be used interchangeably to manufacture both cars and trucks, and therefore established an inventory reporting and control system that relied upon a supposed lack of interchangeability between engines and transmissions used in manufacturing cars and trucks. (*See id.* at 8 (*citing* Moody Dep. at 23–26, 33–34; Anderson Dep. at 241–242, 255).) Defendant further states Mr. Moody testified that if he had been aware that the imported engines and transmissions were used interchangeably to assemble trucks and cars, he would "not have been a party" to Ford's FTSZ operations at Louisville, a "program that [presented] the risk * * * of a misusage of parts." (*Id.* at 9 (*citing* Moody Dep. at 25).) Defendant explains Mr. Moody also testified that the Louisville plant did not keep records of "PD" parts because he assumed "PD" parts did not enter the FTSZ. (*Id.* at 10 (*citing* Moody Dep. at 36–37, 42, 44–45, 73–73, 91).) Finally, defendant notes Mr. Anderson testified that he believed Mr. Tullock understood it was incorrect for Ford to enter "NPF" parts contained in a completed truck at the parts rate but nevertheless continued this practice. (*Id.* at 11 (*citing* Anderson Dep. at 127–131).)

Defendant additionally maintains Ford is unable to rebut the presumption it received the notices of extension. Defendant argues there was no one individual responsible for maintaining Ford's files. Defendant adds

> [n]otices of extension received by Ford were maintained 'loose' in manila folders (along with other materials) in two file drawers contained in a file cabinet that was situated in a common hallway—and that remained unlocked during the day. Files could be removed without signing a register or making any other indication in the file drawer (or elsewhere) that the files had been removed.

(*Id.* at 13–14 (citations omitted).)

DISCUSSION

A. *The Status of the Merchandise & The Mistake:*

Ford contends its failure to pay duties before entering the engines and transmissions into the FTSZ and its "inadvertent" election of "NPF" status instead of "PD" status on the Customs 214 Forms for the merchandise at issue constitutes a clerical error, mistake of fact or other inadvertence with respect to the eleven entries at issue and should be

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[3] The two Ford employees were Alan Moody and Lars Anderson. Lars Anderson was a Customs specialist at Ford's Dearborn headquarters. Alan Moody was supervisor of the Customs' unit and Mr. Anderson's supervisor.

corrected under 19 U.S.C. § 1520(c)(1) (1982). Section 1520(c) provides in relevant part:

> (c) **Reliquidation of entry**
>
> Notwithstanding a valid protest was not filed, the appropriate customs officer may, in accordance with regulations prescribed by the Secretary, reliquidate an entry to correct—
>
> (1) a *clerical error*, mistake of fact, or other inadvertence *not amounting to an error in the construction of a law*, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the appropriate customs officer within one year after the date of liquidation or exaction * * *.

19 U.S.C. § 1520(c) (1982) (emphasis added). This Court has held 19 U.S.C. § 1520(c)(1) is not a remedy for all conceivable mistakes or inadvertences, but rather offers "'limited relief in the situations defined therein.'" *PPG Industries, Inc. v. United States*, 7 CIT 118, 123, 1984 WL 3749 **4 (1984) (citations omitted). *See also Boast, Inc. v. United States*, 17 CIT 114, 116, 1993 WL 45902 (1993) (citations omitted) ("It is well-established * * * [Section 1520(c)(1)] * * * 'affords 'limited relief' where an unnoticed or unintentional error has been committed.'"). This Court has further held that in asserting the subject merchandise has been wrongly classified or assessed incorrect duties due to clerical error, it is incumbent on the plaintiff to show by sufficient evidence the nature of the clerical error. The duty is on the plaintiff to inform the appropriate Customs official of the mistake "with 'sufficient particularity to allow remedial action.'" *PPG Industries, Inc. v. United States*, 4 CIT 143, 148 (1982) (*quoting Hambro Automotive Corp. v. United States*, 81 Cust. Ct. 29, 31, 458 F. Supp. 1220, 1222 (1978), *aff'd*, 66 C.C.P.A. 113, C.A.D. 1231, 603 F.2d 850 (1979)).

Section 1520(c)(1) affords relief only in cases where a mistake of fact, clerical error or other inadvertance has occurred. "A 'mistake of fact exists where a person understands the facts to be other than what they are'" and takes some action based on that erroneous belief, "'whereas a mistake of law exists where a person knows the facts as they really are but has a mistaken belief as to the legal consequences of the facts,'" and acts on that mistaken belief. *Hambro Automotive Corp*, 66 C.C.P.A. at 118, 603 F.2d at 853 (*citing* 58 C.J.S. *Mistake* 832–33 (1948)). *See also Boast, Inc.*, 17 CIT at 116, 1993 WL at 45902 **1 (defining mistake of fact as "'a mistake which takes place when some fact which indeed exists is unknown, or a fact which is thought to exist, in reality does not exist'") (*quoting C.J. Tower & Sons of Buffalo, Inc. v. United States*, 68 Cust. Ct. 17, 22, 336 F. Supp. 1395, 1399 (1972), *aff'd*, 61 C.C.P.A. 90, C.A.D. 1129, 499 F.2d 1277 (1974)). In *PPG Industries, Inc. v. United States*, this Court explained an error in the construction of law would occur, for example when

> the exact physical properties of certain merchandise and all other pertinent facts for classification of that merchandise are known. In

> applying the law the merchandise is classified as an entirety but it should have been classified as separate articles. Or the claim is made that an appraiser acts on incomplete information but the appraiser concludes he would have acted in the same way even if the missing information had been before him. If the appraiser errs in such a case, he commits error of law.

PPG Industries, Inc., 7 CIT at 123–24, 1984 WL 3749 at **5 *(quoting* 94 Treas. Dec. 244, 246, T.D. 54848 (1959)).

Decisions of this Court have established a distinction between cases involving a mistake of fact and those involving a mistake of law based on whether the importer had actual knowledge of the nature and use of the goods at issue. In cases where the Court has concluded an importer did not know the facts as they really were, and therefore lacked true knowledge of the ultimate character of the merchandise, the Court has found a mistake of fact existed. *See, e.g., Universal Cooperatives, Inc. v. United States*, 13 CIT 516, 518, 715 F. Supp. 1113, 1114 (1989) (distinguishing "decisionai" mistakes where party makes wrong choice between two known alternate set of facts, and "ignorant" mistakes, where party is unaware of the existence of the correct set of facts; holding only "ignorant" mistakes can be challenged pursuant to 19 U.S.C. § 1520(c)(1)); *PPG Industries, Inc.*, 7 CIT at 125, 1984 WL 3749 at **6 (holding mistake of law exists where importer is fully aware of the merchandise's nature but believes the legal consequences of it to be other than what they were).

In addition to allowing correction for mistakes of fact, 19 U.S.C. § 1520(c)(1) also encompasses "clerical error[s]". A clerical error has been explained to cover a situation where a person intends to do one thing but does something else, for example, writing "par. 231" instead of "par. 131". *See* 94 Treas. Dec. 244, T.D. 54848 (1959). Clerical errors also include mistakes in arithmetic. *See, e.g., PPG Industries, Inc.*, 7 CIT at 124 (citations omitted) (defining clerical error as mistake by a "clerk or other subordinate, upon whom devolves no duty to exercise judgment, in writing or copying the figures or his exercising his intention").

Finally, 19 U.S.C. § 1520(c)(1) affords relief for "other inadvertence." Case law has defined an inadvertence as an inattention, oversight, negligence, or lack of care. *See Aviall of Texas, Inc.*, 18 CIT at 734, 861 F. Supp. at 106–07 (citing *C.J. Tower & Sons*, 68 Cust. Ct. at 22, 336 F. Supp. at 1399) (defining inadvertence as "'an oversight or involuntary accident, or the result of inattention or carelessness'"); *B.S. Livingston & Co., Inc. v. United States*, 13 CIT 889, 892 (1989) (same). Clerical errors, mistakes of fact or other inadvertences are not necessarily mutually exclusive terms, and in some cases a mistake of fact might also be a clerical error or other inadvertence. *See* 94 Treas. Dec. 244, T.D. 54848 (1959).

Ford argues its employee, Mr. Tullock, acted in a clerical capacity only and "exercised no 'original thought or judgment' in determining which box to check or in failing to pay the duties." (Pl.'s Br. at 28.) As a result, Ford argues his mistake is a clerical error within the scope of 19 U.S.C.

§ 1520(c)(1) and is not an error in the construction of a law. Ford argues "the essence of clerical error is intention" and claims because Mr. Tullock did not intend to claim "NPF" status for the entries, he "committed clerical errors and other inadvertences and was mistaken as to the relevant facts in this case." (Pl.'s Mem. in Opp'n to Def.'s Mot. for Summ. J. ("Pl.'s Mem. in Opp'n") at 4.)

Additionally, Ford argues the actions by its employee constitute mistakes of fact, correctable under 19 U.S.C. § 1520(c)(1) (1982). Ford cites C.S.D. 89–29, 23 Cust. Bull. 583 (1988) for the proposition that where evidence shows the importer had an intent which is explicit and ascertainable from the record, and action is taken contrary to that intent, a mistake of fact has occurred. Ford concludes "[o]bviously, Mr. Tullock's failure to pay the duties on the subject engines and transmissions for trucks and enter them into the FTSZ as 'PD' and his checking the 'NPF' box on the Customs 214 Forms is contrary to FORD's instructions and well-documented intentions and clearly constitutes a 'mistake of fact'." (Pl.'s Br. at 32–33.)

Finally, Ford contends the errors of its employee could be defined as an "inadvertence", which is correctable under 19 U.S.C. § 1520(c)(1) (1982) because "no one expends the money, time, and effort required to establish an FTSZ so that they can pay additional Customs duties * * * in amounts in excess of 800% of the duties payable without using an FTSZ." (*Id.* at 6.) Ford argues its employee's actions fall within the "broad meaning of 'inadvertence,' because [they] were clearly contrary to the instructions from FORD." (*Id.* at 33.)

In making its argument for relief under 19 U.S.C. § 1520(c)(1) (1982), Ford also relies on the decision of this Court in *Executone Information Systems v. United States*, 896 F. Supp. 1235 (CIT 1995), *aff'd*, 96 F. 3d 1383 (Fed. Cir. 1996). In *Executone*, the Federal Circuit held the mistaken belief that certain documents had been filed, when, in fact, they had not been filed, was a mistake of fact correctable under 19 U.S.C. § 1520(c)(1). *See* 96 F.3d at 1388. Although the Federal Circuit ultimately held in favor of the Government due to the importer's failure to provide enough evidence to establish the existence of a mistake of fact, clerical error, or other inadvertence, *see* 96 F.3d at 1390, Ford argues such evidence has been clearly established and substantiated in this case. (Pl.'s Post-Suspension Mem. at 3.)[4]

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[4] Defendant observes the *Executone* Court noted that, although the plaintiff had made conclusory allegations that a mistake of fact or clerical error had occurred, there was no indication in the record that the failure to file the proper forms was due to such a mistake as opposed to intentional or negligent inaction. Defendant adds,

> [s]imilarly in the present case, Ford has failed to demonstrate that the claiming of NPF status for the subject merchandise, the failure to pay duties on the merchandise and the lack of an adequate inventory system were actually the result of a mistake rather than the intentional or negligent actions of a person or people who were under no factual misperception. * * * Furthermore, Mr. Tullock continued making the "clerical error" alleged in this action even after Lars Anderson explained to him "that it was wrong for Ford to enter NPF parts contained [sic] incomplete trucks as parts at the part rate. Like the plaintiff in *Executone*, Ford was negligent in failing to ensure that its employee carried out its instructions. Ford's negligence is not remediable under section 1520(c). Thus, although we agree with Ford that *Executone* is persuasive in this matter, it should persuade this Court that, like the plaintiff in *Executone*, Ford has merely alleged, but has not sufficiently demonstrated, the existence of a "clerical error, mistake of fact, or other inadvertence" within the meaning intended by 19 U.S.C. § 1520(C).

(Def.'s Reply to Ford's Post-Suspension Br. at 5–6 (footnote omitted).)

"has no explanation as to exactly how the wrong foreign trade zone designation was placed on the 214 Forms." (Pl.'s Reply to Def.'s Mem. in Opp'n to Pl.'s Mot. for Summ. J. ("Pl.'s Reply") at 26.)

Further, this Court does not agree Ford made a unintentional clerical error or other inadvertence which led to its choosing "NPF" treatment for the entries at issue. In *B.S. Livingston & Co., Inc.*, 13 CIT at 892 (quoting *C.J. Tower & Sons of Buffalo, Inc.*, 68 Cust. Ct. at 22, 336 F. Supp. at 1399), this Court defined "inadvertence" as "'an oversight or involuntary accident, or the result of inattention or carelessness.'" This Court has also held one of the purposes of 19 U.S.C. § 1520(c)(1) is to eliminate "'certain unnecessary annoyances and inequities which plague both government and private parties engaged in the import-export business.'" *Aviall of Texas, Inc.*, 18 CIT at 734, 861 F. Supp. at 106 (citations omitted). The actions in this case cannot be described as unnecessary annoyances and inequities. Rather, Ford described the entries at issue as "parts" and entered the merchandise at the duty rate applicable to "NPF" parts. This Court believes the evidence indicates Ford's employee was required to exercise his judgment and make certain calculations in order to determine which parts should enter the FTSZ in "PD" status and which proportion of parts should enter in "NPF" status. As a result, this Court finds relief under 19 U.S.C. § 1520(c)(1) (1982), which offers "limited relief in the situations defined therein", *Godchaux-Henderson Sugar Co., Inc.*, 85 Cust. Ct. at 74, 496 F. Supp. at 1331 (*quoting Phillips Petroleum Co. v. United States*, 54 C.C.P.A. 7, C.A.D. 893 (1966)), is not warranted in this case because Ford's errors do not fall within the situations the statute specifically enumerates.

This Court recognizes it was not Ford's intention "to be required to pay 25% *ad valorem* duties" which totaled an additional $5,000,000 on the eleven entries. This Court gives little weight to Ford's argument Customs contributed to the assessment of the additional $5,000,000 in duties by not rejecting the entries outright when they were initially filed. While this Court finds the mistakes in the entries could have resulted in their being rejected outright by Customs, this Court also finds it was Ford's duty, and not the duty of Customs, to accurately file the entries, pay the duties before the merchandise entered the FTSZ and claim "PD" status. Ford is a sophisticated corporation that reasonably could be expected to prepare entry documents with accuracy.

Contrary to Ford's argument, the case *Aviall of Texas, Inc.*, is not applicable here and Customs did not "snare[] [Ford] in a classic 'gotcha'." (Pl.'s Br. at 21 (*quoting Aviall of Texas, Inc.*, 18 CIT at 735, 861 F. Supp. at 107.) In *Aviall of Texas Inc.*, documentation certifying the company to import civil aircraft engines and engine parts free of duty had been accurately filed with the Customs Service "on a regular basis for years" and was corrected as soon as the error was brought to the company's atten-

tion. *See* 861 F. Supp. at 107.[6] In this case, however, Ford failed to claim "PD" status for the entries at issue, even after being notified of the wrong foreign trade zone designation when Ford's Dearborn Headquarters officials came to Louisville to assist the employee in charge and identified the problem. (*See* Pl.'s Reply at 26.) The testimony of Lars Anderson demonstrates Mr. Tullock's understanding of the status designation problem.

> Q. Did you instruct Mr. Tullock that it was wrong for Ford to enter NPF parts contained in completed trucks as parts at the part rate?
> A. Right. He knew that because—well, that was a heavy piece of conversation between ourselves in all the zones.
> * * * * * * *
> A. Well, he understood it when we started and whether something slipped thereafter, I can't say.

(Def.'s Reply at 16–17 (*quoting* Anderson Dep. 125–27).) The testimony of Anderson continued to note

> Q. Did you discuss with Mr. Tullock about what the term "PD" meant?
> A. Yes. He was aware of all the general Customs phrases and terms that were needed to operate and understand the mechanism of operating a zone.

(*Id.* at 21 (*quoting* Anderson Dep. at 129–33).)

Although Ford argues immediate detection by Customs of the errors in the entries "would have made it possible for FORD to avoid the $5,000,000 assessment by exporting or disassembling the vehicles which were already assembled and duty-paying the foreign components which were not yet assembled", (Pl.'s Br. at 23), this Court finds Ford is a sophisticated corporation which is accountable for its errors and cannot blame the Customs Service for its failure to reject the entries. Additionally, the Court notes Customs was specifically concerned that Ford had improperly classified cars as trucks, (*see* Def.'s Resp. to Pl.'s Fourth Set of Interrogs. & Req. for Admis. at 2 (*reprinted in* Pl.'s App. Ex. 21)), and there was an ongoing investigation regarding an alleged violation of 19 U.S.C. § 1592 (1988) and potential misrepresentations of information by Ford regarding the classification or appraisement of entered merchandise. This Court previously noted "[t]he government has no cognizable interest in retaining duties which were improperly collected as a result of clerical error, mistake of fact, or inadvertence." *Aviall of Texas, Inc.*, 18 CIT at 735, 861 F. Supp. at 107. This Court finds, however, the duties in this case were properly collected. Ford has failed to prove that Mr. Tullock, whose illness prevents him from clearly remembering his own actions regarding the events at issue in this case, made a mistake of fact, clerical error or other inadvertence. As a result, this Court holds 19 U.S.C. § 1520(c)(1) offers no relief to Ford in this case.

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[6] As the Court of Appeals for the Federal Circuit noted, "Aviall missed a deadline which silently passed without notice. Aviall acted promptly to correct the mistake which occurred through inadvertence." *Aviall of Texas, Inc. v. United States*, 70 F. 3d 1248, 1251 (Fed. Cir. 1995).

B. *Receipt of the Extension Notices:*

The statute provides that merchandise "not liquidated within one year" of its entry into the United States is liquidated by operation of law on the first anniversary of the date of entry "at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer" or its agent. 19 U.S.C. § 1504(a) (1982). The statute, however, includes several exceptions which permit Customs to extend liquidation beyond the first anniversary of the goods entering the United States by notifying the importer of the extension. One exception allows an extension if "information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer." 19 U.S.C. § 1504(b)(1) (1982). The statute also requires that "[i]f the liquidation of any entry is suspended * * * notice of such suspension [will] be provided to the importer [of record] concerned and to any authorized agent and surety of such importer [of record]." 19 U.S.C. § 1504(c) (1982). *See also* 19 C.F.R. § 159.12 (b)–(d) (1985) (if liquidation is extended or suspended, the importer must be notified promptly that the time for liquidation has been extended and of the reasons for the extension).

Ford argues the entries at issue should be deemed liquidated "as entered" by operation of law one year after they were filed because neither Ford nor its surety received any of the sixty-six notices of extension of liquidation applicable to the entries. Ford contends defendant relies solely on computer printouts which indicate the notices were prepared and argues "Customs has chosen to dispose of hard copies which would be otherwise available as evidence that [n]otices were actually prepared." (Pl.'s Br. at 35.) Additionally, Ford maintains Customs

> has been unable to produce a single witness employed by either the Government or by its contractors who can personally testify that the 66 Extension Notices allegedly mailed to FORD and its surety were actually printed, reviewed and/or placed in the U.S. Mail. Finally, the Defendant has been unable to produce an actual copy of any of the 66 Extension Notices, which it claims were generated and mailed to FORD and to FORD's surety, and the Defendant cannot even produce the computer tapes which allegedly produced the Extension Notices in the subject entries.

(*Id.*) Plaintiff maintains Ford and its surety conducted extensive searches of their records kept in the regular course of business but located no evidence that the notices had ever been received. Ford also argues "[v]arious courts have held that the failure to receive a notice through the mail raises a presumption that it was not mailed" and asserts this presumption shifts the burden back to the Government to prove the fact of mailing. (Pl.'s Br. at 38–39 (*citing F.W. Myers & Co., Inc. v. United States*, 6 CIT 215, 217, 574 F. Supp. 1064, 1066 (1983) (holding affidavit stating "[w]e searched our files and were unable to locate any notice of Customs Service action on this protest, and we believe that no notification was sent to us" was sufficient to raise the presumption of non-receipt of notice)).)

Ford concludes the evidence in this case "is insufficient to rebut the affidavits of FORD's personnel and of FORD's surety and the testimonial evidence given in the depositions which establishes that none of the alleged 33 Extension Notices [was] [sic] sent to each." (Pl.'s Br. at 41–42.) Ford argues because Customs failed to give notice of the extensions, its efforts to extend the time for liquidation of the entries were unsuccessful. As a result, plaintiff argues, the eleven entries at issue should be deemed liquidated by operation of law, as entered, one year from their respective dates of entry.

In response, defendant argues "[t]here is a presumption in favor of the Government that Ford received proper notice." (Def.'s Br. at 22 (*citing International Cargo & Sur. Ins. Co. v. United States*, 15 CIT 541, 544, 779 F. Supp. 174, 177 (1991); *Star Sales & Distributing Corp. v. United States*, 10 CIT 709, 710, 633 F. Supp. 1127, 1129 (1986)).) Defendant argues Ford cannot rebut this presumption "because neither Ford nor its surety maintain sufficient records to establish nonreceipt of the notices of extension at issue." (Def.'s Br. at 22.) Defendant explains because Ford's surety conceded it did not generally retain notices of extension that it received from Customs[7] and could not produce a single notice of extension relating to Ford, "there is simply no logical basis to infer nonreceipt of such notices by their absence from the surety's records" and, therefore, "there is no evidence to rebut the presumption that the surety received such notices." (*Id.* at 22–23.)

Defendant also asserts Ford's records are insufficient to establish an inference of non-receipt. Defendant argues because Ford could not produce any records of notices predating August 1991, "the records that Ford allegedly searched in determining that it had not received the notices of extension at issue in this case have been destroyed" and "the destruction of relevant evidence may warrant an inference that the evidence would have been unfavorable." (*Id.* at 23.) Defendant adds even if Ford had not destroyed its records, "the evidence developed during depositions establishes that Ford's recordkeeping is so inadequate that no inference of non-receipt can reasonably arise from the absence of the notices in the records." (*Id.* at 24.) Defendant points to statements by the former supervisor or Ford's Customs Division, who stated when she received a notice of extension, she would simply file it without making copies or informing anyone of its receipt. Defendant concludes Ford's record-keeping is so poor and "the contours of its document destruction policy are so ambiguous" that Ford cannot even explain why other pre–1991 notices of extension not at issue in this case are absent. (*Id.* at 25.) Defendant argues that because the notices of extension re-

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[7] Defendant notes that despite Customs' mailing over 23,277 notices to Ford's surety since 1986, the surety was unable to produce a single one of those notices. (Def.'s Mem. in Opp'n at 14.) Defendant also cites the testimony of an employee of the surety:

> Q: Well, do you have any reason to believe that Notices of Extension are retained by the field offices as a matter of company policy? Do you know one way or the other?
>
> A: They—they may or not be retained, again depending on the circumstances.

(Def.'s Reply to Pl.'s Mem. in Opp'n to Def.'s Mot. for Summ. J. ("Def.'s Reply") at 25 (*citing* Jewitt Dep. 29–32).) The surety's employee continued to admit it was possible that the reason no notices were found when the files in the field office were searched is because "the notices were received * * * [but] just not placed in the file." (*Id.* at 26.)

ceived by Ford were maintained "loose" in manila folders in two file drawers in an unlocked file cabinet situated in a common hallway, the files could have been removed or disposed of without notice. Defendant concludes,

> [i]n sum, the evidence contained in the record does not support a reasonable inference that Ford failed to receive the notices at issue. To the contrary, it would be equally reasonable to infer that the notices were removed by one of the many people who have access to Ford's unlocked files, destroyed, lost in Ford's 1989 move to its new headquarters, or not properly filed in the first place.
>
> Finally, it is not surprising that [Ford's managers] can[not] recall reviewing the notices of extension. This is so because the notices of extension were opened and filed by a secretary, who would not have informed [them] that the notices has been received.

(Def.'s Reply to Pl.'s Mem. in Opp'n to Def.'s Mot. for Summ. J. ("Def.'s Reply") at 35–36 (citations omitted).)

Examining the evidence on the record, the Court finds that although defendant possesses no direct proof the extension notices were mailed, this lack of direct evidence does not automatically defeat the Government's ability to establish the extensions were prepared and mailed. In *A.H. Deringer, Inc. v. United States*, Slip Op. 96–131 (CIT Aug. 13, 1996), the Court relied on 19 U.S.C. § 1504 (1988) and 19 C.F.R. § 159.12 (1987) to uphold the Government's assertion that the requisite notices of extension and suspension of liquidations were given to the importer, who was unable to establish non-receipt thereof. In *Deringer*, the Court addressed two presumptions. First, the Court recognized a presumption of regularity attaches to the acts of government officials, a presumption that, unless rebutted by Ford, would establish that the extension notices were properly prepared and mailed by Customs. *See Deringer*, Slip. Op. 96–131 at 17 (*citing International Cargo & Surety Insur. Co.*, 15 CIT at 544, 779 F. Supp. at 177 (1991) (finding presumption of regularity gives rise to a presumption that appropriate notice is provided in accordance with statutory and regulatory requirements).) The Court in *Deringer* also recognized the presumption that proof of mailing raises a presumption of delivery, which is rebutted by proof of non-receipt. *Id.* at 18 (*citing Intra-Mar Shipping Corp. v. United States*, 66 Cust. Ct. 3, 5–6, C.D. 4160 (1971)). *See also Rosenthal v. Walker*, 111 U.S. 185, 193, 4 S.Ct. 382, 386, 28 L.Ed. 395 (1884) (letter properly directed that is placed in the mail or delivered to postal carrier is presumed to have reached its destination and to have been received by person to whom it was addressed). In *Deringer*, the Court reviewed extensive evidence of the computer system in place for the notice, preparation and mailing of notices, as well as testimony from the same Customs officials deposed in this case, and determined the presumption of regularity that attaches to official acts was appropriate, despite the absence of direct proof the extension notices were prepared and mailed. *See Deringer*, Slip. Op. 96–131 at 13–14. This resulted in a presumption that notice had been given in accordance with statutory and regulatory requirements.

The Court notes Ford's argument the decision in *Deringer* should not be followed, because, unlike in *Deringer*, in this case, "the Government has neither succeeded in establishing that all the notices were printed nor that they were all placed in the mail, which is specifically recognized in the *Deringer* case as part of the Government's burden." (Pl.'s Post-Suspension Mem. at 6–7.) The Court also notes defendant's counter-argument that, "as the *Deringer* court found, lack of direct evidence does not automatically defeat the Government's ability to establish the facts that give rise to relevant presumptions." (*Id.* at 8.) This Court finds the facts and reasoning in *Deringer* are applicable here. The Court observes in this case, Customs points out an import specialist authorized the issuance of the extensions and a computer printout furnished to Ford identified the dates the notices were printed. The Chief of the Entry Control Processing Branch, a branch within the Commercial Systems Division of Customs, explained that once data regarding an extension of liquidation is entered into Customs' Automated Commercial System ("ACS"), the extension notice is automatically scheduled to be printed on the following weekend, as part of Customs' "end-of-week" processing, and notices of extension are formatted and printed by computer onto Customs Form 4333A. (*See* Declaration of Arthur Versich at 1–2 (*reprinted in* Def.'s App. at 172–77).)[8] Based on his knowledge of the notice system and his experience as a former import specialist, Mr. Versich concluded "that 66 notices were issued on an appropriate basis each time, and the notices were properly addressed and timely printed and mailed." (*Id.* at 4.) Additionally, Roger Odom, the Supervisor for Customs' Computer Operations and Production Management Section, who was responsible for computer operations at Customs' Data Center, explained that after the notices are printed and addressed by computer, they are removed by an operator and placed in plastic trays provided by the Postal Service, and are picked up by the Postal Service within twenty-four hours of printing. (*See* Declaration of Roger Odom at 4 (*reprinted in* Def.'s App. at 178–82).) An employee from Customs' Office of Automated Commercial Systems additionally testified that records demonstrate for each entry, a notice to the importer and a notice to the surety for a first extension was printed on or shortly after October 25, 1986, for a second extension on or shortly after November 28, 1987, and for a third extension, on or shortly after October 22, 1988. (*See* App. to Def.'s Mem. in Opp'n to Pl.'s Mot. for Summ. J. at 175.)

As a result of the above, this Court finds Ford has not identified any deficiency in Customs' automated system for mailing notices to establish non-receipt of the sixty-six notices. Rather, the Court finds the computer systems in place at Customs for the preparation and mailing of extension notices are sufficient to give rise to the presumption that Customs properly prepared and mailed the notices of extension of liquidation. These notices are presumed to have been received by the plaintiff,

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[8] *See Deringer*, Slip Op. 96–131 at 22–30 for a more detailed explanation of Customs' Automated Commercial System.

who has the burden of proving non-receipt. As the *Deringer* Court noted, "[t]o require the government to prove not only mailing, but actual receipt of Form 4333–A by the importer, would erect a virtually unassailable hurdle. Rarely, if ever, would the government possess or elicit proof of receipt from an importer claiming nonreceipt." *Deringer*, Slip Op. 96–131 at 32.

This Court also finds Ford has not adequately satisfied the burden of showing the sixty-six notices of extension were not received by either Ford or its surety. As in *Deringer*, sufficient evidence to establish the notices were prepared and mailed based on the presumption of regularity was presented in this case and the burden of proving non-receipt shifted to the plaintiff. *See Deringer*, Slip Op. 96–131 at 32. This Court is not persuaded that Ford's internal record retention and transmittal system could account adequately for all incoming mail so as to preclude the misplacement of extension and suspension notices. *See e.g., International Cargo & Surety Insur. Co.*, 15 CIT at 544, 779 F. Supp. at 177; *Intra-Mar Shipping Corp.*, 66 Cust. Ct. at 5–6, C.D. 4160 (1971); *Rosenthal*, 111 U.S. at 193, 4 S.Ct. at 386, 28 L.Ed. 395. The Court notes defendant's argument that

> [t]he computer system utilized by Customs to send the notices to Ford is the same one that was discussed in *Deringer*. * * * The *Deringer* case establishes that the systems in place at the Customs Service are sufficient to give rise to the presumptions that the notices of extension were generated and mailed. * * * Ford's internal record retention system falls woefully short of what is required to rebut the presumption that the extension notices were, in fact, mailed and received.

(Def.'s Reply to Pl.'s Post-Suspension Mem. at 9.) This Court finds Ford has been unable, as a matter of law, to rebut the presumption that it received the notices of extension. This Court notes the deposition testimony of a Ford employee:

> Q: Okay. So [a secretary] opens this letter, sees it is a notice, and she sticks it in a supervisor's slot. Which supervisor would that be?
> A: No, she would not have done that. She would have filed it.
> Q: She would file it? She would open—she would open the notice and she would then file the notice?
> A: Yes.
> Q: Would she tell anyone that you had received it?
> A: The file was there for reference if someone needed to use it.
> Q: So you are telling me, your testimony is, [the secretary] receives a notice, opens it, and seeing that it's a Notice of Extension of Liquidation, she doesn't inform anyone, she just goes and files it?
> A: That's correct.
> Q: Would she make copies of it?
> A: No.

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[9] Donald Cohen is the Manger of U.S. Customs Compliance and Operations at Ford.

(Def.'s Reply at 36 (quoting Cohen[9] Dep. at 51).) The Court notes Ford was asked at oral argument to show that it kept accurate records with regard to the extensions sent to it from time to time. *See* Oral Arg. Tr. at 57–58. The Court finds Ford failed to offer sufficient evidence to rebut the presumption of regularity and to prove the non-receipt of the extensions in this case by showing with sufficient evidence that its record-keeping system accurately kept note of and established the non-receipt of notices of extensions.

Finally, the Court notes Ford's argument that Customs should protect itself in cases involving potentially large losses of revenue, such as this one, by sending notices of extension in a method which is calculated to insure receipt with proof of receipt. The Court finds, however, it is Customs' responsibility and not this Court's to mandate such a change in policy. The *Deringer* Court noted that under 19 U.S.C. § 1504, Customs is afforded the discretion to choose the "form and manner" of providing notice to the importer of an extension of liquidation. *Deringer*, Slip Op. 96–131 at 31. The Court also noted "[a]s demonstrated by the regulations, Customs has chosen the ordinary mailing of a Form 4333–A to provide such notice to the importer. There is nothing to indicate that this means of providing notice fails to comply with Customs' statutory mandate." *Id.* This Court finds no reason to depart from this policy. The Court further notes the statement in *Deringer* that "[a] claim of nonreceipt in this context must be scrutinized carefully by the court, given the incentive that a plaintiff may have to claim that no notice was received." *Id.* at 15. The Court finds the evidence Ford presented was insufficient to establish non-receipt of the notices. As a result, this Court finds the presumption the notices were mailed and delivered to Ford has not been overcome.

C. *The Legality of the Extensions of Liquidation:*

As noted above, pursuant to 19 U.S.C. § 1504(b)(1) (1982), Customs is authorized to "extend the period in which to liquidate an entry * * * if (1) *information needed for the proper appraisement or classification* of the merchandise *is not available* to the appropriate customs officer." 19 U.S.C. § 1504(b) (1982) (emphasis added). The regulation implementing the statute further provides that

> If the district director extends the time for liquidation, as provided in paragraph (a)(1) of this section, he promptly shall notify the importer or the consignee and his agent and surety on Customs Form 4333–A, appropriately modified, that the time has been extended and the reasons for doing so.

19 C.F.R. § 159.12(b) (1985). Because this Court has found Ford failed to rebut the presumption that notice of the extensions of liquidation was given, the last issue before the Court is whether the extensions were permissible under the statute.

Ford argues Customs lacked a legitimate basis for issuing the three extensions of liquidation and abused its discretion in issuing the extensions because "the *only* stated reason for the initial referral to the Office

of Enforcement was the significant amount of the revenue involved. There was no mention of any classification or valuation facts to be developed." (Pl.'s Reply at 43–44.) Ford adds even assuming a valid reason for extending the liquidations existed initially, the length of the extensions clearly was unreasonable and an abuse of discretion by Customs. Ford argues it is clear that on or before June 16, 1986, the appropriate customs officer had all the information necessary to classify, appraise and liquidate the entries at issue in this case, making it unnecessary for Customs to extend the liquidation of the entries until December 1, 1989.

Ford argues *St. Paul Fire & Marine Insur. Co. v. United States*, 6 F.3d 763 (Fed. Cir. 1993) is dispositive of this issue. In *St. Paul*, the Court held Customs cannot extend liquidation where the importer eliminates "all reasonable bases for making th[e] decision" to extend the liquidation period. *St. Paul Fire & Marine Insur. Co.*, 6 F.3d at 768. Ford argues in this case it is undisputed that "Customs made no request to Ford to produce any further information bearing on the classification or the valuation of the subject merchandise, and there is no evidence that Customs pursued these subjects thereafter." (Pl.'s Mem. of March 7, 1995 Resp. to Req. of Ct. Made at Oral Arg. at 7.)

Defendant, however, argues "Ford and its surety were each given the proper amount of notices of *extension* of liquidation to permit the liquidations of the 11 subject entries to be extended to their dates of liquidation." (Def.'s First Am. Answer at 2 (*reprinted in* Pl.'s App. Ex. 12).) Defendant explains the extensions were issued because there was an ongoing investigation regarding an alleged violation of 19 U.S.C. § 1592 (1988). (*See* Def.'s Resp. to Pl.'s Second Set of Interrog. & Req. for Produc. at 19 (*reprinted in* Pl.'s App. Ex. 20).) Defendant maintains in order for Ford to prevail on its argument that Customs abused its discretion in extending the time for liquidation, Ford must establish that Customs "extended the period of liquidation 'with actual knowledge that no basis exist[ed] for so doing.'" (Def.'s Mem. in Opp'n at 22 (*quoting St. Paul Fire & Marine Ins. Co.*, 6 F.3d at 768 (Customs' decision to extend time for liquidation is entitled to a presumption of legality unless plaintiff can prove decision was unreasonable)).) Defendant concludes

> [b]ecause there was an issue as to whether Ford knowingly misrepresented the character of the merchandise it entered into Commerce, Customs had a reasonable need for further information.
>
> * * * * * * *
>
> Under these circumstances, *any* additional information that Customs uncovered in its section 1592 investigation would be relevant to the proper assessment of duties.

(Def.'s Mem. in Opp'n to Pl.'s Mot. to Compel Answers to Interrog. at 3.)

Defendant explains "aside from Ford's misrepresentations that completed cars and trucks were 'parts,' Customs was specifically concerned that Ford had improperly classified cars as trucks." (Def.'s Resp. to Pl.'s Fourth Set of Interrogs. & Req. for Admis. at 2 (*reprinted in* Pl.'s App. Ex. 21).) Defendant explains Ford's own employee testified that when

he reviewed the entries, he discovered errors regarding the quantity of parts entered, the classification of the parts and their value. (*See* Def.'s Mem. in Opp'n at 22.) Defendant explains Customs was also investigating Ford's claims for classification under TSUS item 807.00 and that "[b]eyond this, the Customs Forms cf 214 and 216 allegedly submitted by Ford could not be located, and were only obtained pursuant to the section 1592 investigation. Finally, Customs could not account for the quantity of merchandise contained in Ford's requests for immediate release." (Def.'s Resp. to Pl.'s Fourth Set of Interrogs. & Req. for Admissions at 2–3 (*reprinted in* Pl.'s App. Ex. 21).) Defendant concludes "[a]ccordingly, it is plain that, at least in early 1986, further information was reasonably necessary for the proper classification and appraisement of the merchandise at issue." (Def.'s Mem. in Opp'n at 23.)

Defendant argues judicial precedent "has clearly established that, when an importer challenges Customs' extension of the time to liquidate entries of imported merchandise, the burden is on the importer, not the Government, to demonstrate that no possible grounds for such an extension existed." (*Id.* at 3–4.) Defendant cites the recent decision of this Court in *A Classic Time v. United States*, 942 F. Supp. 589 (CIT 1996), *appeal docketed* No. 97–1062 (Fed. Cir. 1997), where the Court held Customs' actions in extending the time for liquidation was proper. In *A Classic Time*, the Court noted that the term "information" as used in 19 U.S.C. § 1504(b)(1) is to be construed broadly. *See A Classic Time*, 942 F. Supp. at 594 (*citing Detroit Zoological Soc'y v. United States*, 10 CIT 133, 138, 630 F. Supp. 1350, 1356–57 (1986)). The Court additionally noted the only limitation on Customs' discretion to extend a liquidation period is the elimination of all possible grounds for such an extension by the party challenging the extension. *Id.* (*citing St. Paul Fire & Marine Ins. Co.*, 6 F.3d at 768).

After considering the arguments of all parties, this Court finds Customs properly extended the time for liquidation of the eleven entries at issue. Pursuant to 19 U.S.C. § 1504(b) (1988), Customs is authorized to "extend the period in which to liquidate an entry * * * if (1) information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer." The scope of 19 U.S.C. § 1504(b)(1) was considered in *Detroit Zoological Society v. United States*, 10 CIT 133, 630 F. Supp. 1350 (1986). In that case, the Court found Customs' extension was justified under § 1504(b)(1) and held "[t]he term 'information,' as it is used in the statute, 19 U.S.C. § 1504(b)(1) (1982) * * * should be construed to include whatever is reasonably necessary for proper appraisement or classification of the merchandise involved." *Detroit Zoological Society,*10 CIT at 138, 630 F. Supp. at 1356. The Court in *International Cargo & Sur. Ins. Co. v. United States*, 779 F. Supp. 174, 179 (CIT 1991) added "liquidation may be extended when the delay is motivated by the legitimate need for additional information from the government." As the Court said in *Detroit Zoological Society,* "ordinarily, the court should defer to Customs' deter-

mination that it needs additional information to liquidate an entry and therefore requires an extension of the statutory time period." *Detroit Zoological Society*, 10 CIT at 138, 630 F. Supp. at 1357.

As a result of the above, the Court finds Customs acted properly in extending the time for liquidation of the entries while its investigation pursuant to 19 U.S.C. § 1592 continued and it gathered necessary information. Defendant has demonstrated Customs had legitimate purposes and a reasonable basis for extending the time for liquidation of the eleven entries and this Court therefore upholds the extensions.

CONCLUSION

The Court holds Ford has not proven it is entitled to relief under 19 U.S.C. § 1520(c)(1) (1982) because it has not shown it made a mistake of fact, clerical error or other inadvertence in not claiming "PD" status for the entries at issue. The Court also finds Ford has failed to present sufficient evidence to overcome the presumption that Customs mailed the notices of extension of liquidation in this case. Finally, this Court rejects Ford's argument Customs had no legal basis to extend the liquidations in this case. As a result, the Court denies Ford's Motion for Summary Judgment and grants defendant's Motion for Summary Judgment.

(Slip Op. 97–122)

NSK LTD. AND NSK CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND FEDERAL-MOGUL CORP. AND TORRINGTON CO., DEFENDANT-INTERVENORS

Court No. 92–07–00470

(Dated August 28, 1997)

ORDER

TSOUCALAS, *Senior Judge:* In accordance with the decision (June 10, 1997) and mandate (Aug. 1, 1997) of the United States Court of Appeals for the Federal Circuit, Appeal No. 96–1359, remanding this case with instructions, it is hereby

ORDERED that the portion of the decision of the Court in *NSK Ltd. v. United States*, 20 CIT ____, Slip Op. 96–50 (March 7, 1996), upholding the Department of Commerce, International Trade Administation's ("Commerce") inclusion of NSK Ltd. and NSK Corporation's ("NSK") free bearing samples to potential U.S. customers in NSK's U.S. sales database to compute U.S. price is vacated; and it is further

ORDERED that Commerce exclude NSK's free bearing samples to potential U.S. customers from NSK's U.S. sales database in computing U.S. price; and it is further

ORDERED that Commerce report the results of this remand to the Court within 60 days of this order.

(Slip Op. 97–123)

SSAB SVENSKT STÅL AB, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND BETHLEHEM STEEL CORP., DEFENDANT-INTERVENOR

Court No. 96–05–01372

[Commerce's *Final Determination* sustained in part and remanded in part.]

(Dated August 29, 1997)

Perkins Coie *(Thomas V. Vakerics, Mary Rose Hughes* and *Mark T. Wasden)* for plaintiff.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *(Velta A. Melnbrencis)* and *Dean A. Pinkert*, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for defendant.

Skadden, Arps, Slate, Meagher & Flom LLP *(Robert E. Lighthizer, John J. Mangan* and *Ellen Schneider)* for defendant-intervenor.

MEMORANDUM OPINION

DICARLO, *Senior Judge:* Plaintiff SSAB Svenskt Stål AB moves for judgment on the agency record pursuant to USCIT Rule 56.2. SSAB Svenskt Stål AB is a Swedish holding company. Two of its wholly-owned subsidiaries, SSAB Oxelösund AB ("SSOX") and SSAB Tunnplåt AB ("SSTP") are the manufacturers of the steel in question, collectively referred to herein as "SSAB". Tibnor AB ("TAB"), a partially-owned subsidiary, is a distributor of the steel.

SSAB is seeking review of *Certain Cut-to-Length Carbon Steel Plate From Sweden: Final Results of Antidumping Duty Administrative Review*, 61 Fed. Reg. 15,772 (Dep't Comm. 1996) [hereinafter *Final Determination*]. Commerce assigned a final antidumping duty margin of 8.28% against entries of certain SSAB cut-to-length carbon steel plate from Sweden. *Id.* at 15,782. SSAB raises four issues:

> 1. Whether Commerce erred by failing to deduct from SSAB's home market prices the rebates which SSAB paid to certain home market customers;
>
> 2. Whether Commerce erred by excluding SSAB downstream sales to TAB for the purpose of calculating foreign market value;
>
> 3. Whether Commerce erred in applying (1) zero packing costs to home market sales for SSOX and (2) deducting the highest reported packing cost from all of SSOX's U.S. sales;
>
> 4. Whether Commerce erred in making an upward adjustment to all home market sales made via TAB, based on errors discovered in certain commissions reported by SSAB.

(Pl.'s Mot. Supp. J. on Agency R. at 3.)

Once Commerce makes its final determination, the court's role is to uphold that determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i) (1994). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)

(quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Jurisdiction is proper under 28 U.S.C. § 1581(c) (1994).

DISCUSSION

I. *Deduction of Rebates:*

During the period of review, SSAB granted certain home-market customers rebates on the value of their total purchases. *Final Determination* at 15,779; (Pl.'s Br. at 10.) Commerce declined to adjust the foreign market value based upon these home-market rebates, finding that the rebates were made on a customer-specific, not transaction-specific basis. Based upon the decision in *Torrington Co. v. United States*, 82 F.3d 1039 (Fed. Cir. 1996), rendered after the *Final Determination* was issued, the government asks that this issue be remanded. (Def.'s Mem. Partial Opp'n Pl.'s Mot. J. on Agency R. at 6–8.) According to the government, under *Torrington*, the rebates in issue are direct selling expenses, for which a circumstance-of-sale adjustment to foreign market value is appropriate, if (1) the record demonstrates that the rebates were paid on either a fixed and constant percentage-of-sales value or on a fixed and constant Swedish Kroner-per-ton of total tonnage sold and (2) the record demonstrates there was sufficient quantification for a circumstance-of-sale adjustment. The government asks that Commerce be given an opportunity on remand to review the record and see if the above two conditions have been met. Plaintiff SSAB argues that the conditions are more than sufficiently met, and that the court should order that the rebate adjustment be granted outright. Given that Commerce has not specifically considered this issue, and given the court's standard of review, the court finds it is appropriate to remand the issue for Commerce to make the determination in the first instance as to the propriety of the rebate adjustment.

II. *SSAB Related-Party Sales to TAB:*

In determining an antidumping duty, Commerce calculates (1) the foreign market value (FMV) and U.S. price of each entry of merchandise involved and (2) the amount, if any, by which the FMV of each entry exceeds U.S. price. In general, FMV of the imported merchandise "shall" be the price at which such or similar merchandise is sold or offered for sale in the country from which exported. 19 U.S.C. § 1677b(a)(1)(A) (1988). However, when the merchandise is sold in the exporting country to a related party, the statute does not require that those sales be used in determining FMV:

> If such or similar merchandise is sold or, in the absence of sales, offered for sale through a sales agency or other organization related to the seller * * *, the prices at which such or similar merchandise is sold or, in the absence of sales, offered for sale by such sales agency or other organization *may* be used in determining the foreign market value.

19 U.S.C. § 1677b(a)(3) (emphasis added). As the statute does not specify circumstances under which related party sales are to be used to calcu-

late FMV, Commerce must necessarily be accorded deference. *Saarstahl AG v. United States*, 78 F.3d 1539, 1544 (Fed. Cir. 1996) (explaining "[i]n the absence of specific mandates * * * Commerce's approach must be accorded deference.")

During the period of review, the implementing regulation provided, in relevant part:

> If a producer or reseller sold such or similar merchandise to a person related as described in [19 U.S.C. § 1677(13)], the Secretary ordinarily will calculate foreign market value based on that sale only if satisfied that the price is comparable to the price at which the producer or reseller sold such or similar merchandise to a person not related to the seller.

19 C.F.R. § 353.45(a) (1994).

Commerce's normal practice is to disregard the manufacturer's prices to its related distributors or dealers in calculating foreign market value unless the manufacturer demonstrates to Commerce's satisfaction that the prices are at arm's length. Under its arm's length test, Commerce compares, on a product-by-product basis, the weighted-average price of total sales from the respondent to the related customer with the weighted-average price of total sales from the respondent directly to unrelated parties. Then,

> [i]f the customer-specific related/unrelated price ratio [is] greater than or equal to 99.5 percent * * * , [Commerce] determine[s] that all sales to that related customer [are] made at arm's length * * *. Conversely, if the customer-specific related/unrelated price ratio [is] less than 99.5 percent, [Commerce] determine[s] that all sales to that related customer [are] not arm's length transactions because, on average, that customer was paying less than unrelated customers for the same merchandise.

Certain Cold-Rolled Steel Flat Products from Argentina, 58 Fed. Reg. 7,066, 7,069 app. II(A) (Dep't Comm. 1993) (prelim. determination). In performing the test on SSAB's sales to TAB, Commerce found that the overall ratio was less than 99.5%, *i.e.*, the sales prices to TAB, on average, were not comparable for the same products. Commerce therefore decided to exclude all such sales.

Plaintiff SSAB disputes the validity of this test, because it allegedly fails to test for the "true" issue: whether the respondent actually manipulated its prices to the related party. (Pl.'s Br. at 18–19.) SSAB argues that the record evidence makes abundantly clear that it could not have and indeed did not manipulate prices. Specifically, SSAB claims that (1) TAB is not a shell company; (2) TAB is not a "captive distributor;" (3) SSAB attempted to obtain as high a price as possible from TAB; and (4) TAB purchased steel from SSAB and unrelated suppliers at the same prices. *Id.* at 19, 21–23. SSAB also urges the court to impose upon Commerce additional factors by which to test for price manipulation, including an examination of stock ownership and the nature of the related distributor's operations. *Id.* at 26–27.

In *Usinor Sacilor v. United States*, 18 CIT 1155, 1158, 872 F. Supp. 1000, 1004 (1994), the court held that it would uphold Commerce's arm's length test unless the test was shown to be unreasonable because it distorted price comparability. Plaintiff has not pointed to evidence on the administrative record which would reveal that application of this broad-averaging test would result in distorted price comparability, *i.e.*, would distort the objective measurement of whether the related sale is representative of plaintiff's general pricing practice. *See Micron Technology Inc. v. United States*, 19 CIT ____, ____, 893 F. Supp. 21, 38 (1995) ("This court will uphold the test that Commerce selects to measure whether sales to related parties were made at arm's length prices unless that test is shown to be unreasonable"), *aff'd*, 117 F.3d 1386 (Fed. Cir. 1997). Furthermore, this court has previously rejected a respondent's attempts to impose qualitative factors onto the price-based test applied by Commerce. In *NTN Bearing Corp. of America v. United States*, 19 CIT ____, ____, 905 F. Supp. 1083, 1099–1100 (1995), the court rejected the notion that Commerce's arm's length test was flawed because it did not take into account certain qualitative factors. *See also NSK Ltd. v. United States*, 21 CIT ____, ____, Slip Op. 97–74 (June 17, 1997), at 43–44 (noting "[t]his Court has also rejected the contention that Commerce should consider other factors (*i.e.*, factors other than price) in determining comparability"). Commerce's decision to disregard sales to TAB in calculating foreign market value is supported by substantial evidence on the record, and Commerce's application of the arm's length test is in accordance with law.

III. *U.S. and Home Market Packing Expenses:*

During verification, SSOX (one of the SSAB subsidiaries) was unable to verify the reported packing expense figures for either its U.S. or home market sales. *Final Determination* at 15,773. As a result, Commerce (1) assigned to all SSOX U.S. sales the highest reported packing cost for U.S. sales and (2) did not deduct SSOX's reported home market packing expense from foreign market value. *Id.* Plaintiff SSAB argues that Commerce's choice of BIA is punitive and unduly harsh.

Under 19 U.S.C. § 1677e(b) (1988), if Commerce is unable to verify the accuracy of the information submitted, "it shall use the best information available to it as the basis for its action[.]" Commerce's questionnaire requested that SSAB report packing expenses, and SSAB submitted packing expenses. Prior to verification, Commerce transmitted a verification outline to SSAB. In this outline, Commerce requested that SSAB be "prepared to demonstrate the method that [it] used to determine the amount of expenses for the relevant cost centers that was attributable to packing[,]" and be prepared to "trace [its] total reported packing expenses for the review period to [its] audited financial statements[.]" Letter from Edward C. Yang, Div. Dir., Office of Agreements Compliance, Dep't Comm., to Thomas Vakerics, Perkins Coie encl. at 9 (June 5, 1995). At verification, however, SSOX failed to support the packing expense figures that were submitted by SSAB, the

parent, holding company. *Final Determination* at 15,773. Commerce therefore used BIA as provided for in 19 U.S.C. § 1677e(b).

SSAB argues that Commerce's chosen BIA is punitive and should be struck down, because SSAB never failed to cooperate with Commerce and made good faith efforts to prepare packing costs data, despite the fact that SSOX did not have a packing department. SSAB asserts that Commerce should therefore have used a less adverse BIA to fill in gaps discovered upon verification. (Pl.'s Br. at 29–30.)

Commerce uses partial BIA when, as in this case, a respondent's responses are deficient or cannot be verified in limited respects, yet are reliable and verified in most other respects. *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France*, 57 Fed. Reg. 28,360, 28,379 (Dep't Comm. 1992) (Final results admin. review). Substantial evidence on the record supports Commerce's decision to employ partial BIA and its choice of BIA. SSAB provided SSOX's U.S. packing cost information, but plaintiff could not provide necessary information to verify the packing cost submissions. Given this circumstance, the court finds Commerce was justified in resorting to partial BIA. In deciding to use BIA, Commerce chose to apply the highest U.S. packing cost which SSAB reported for SSOX, *i.e.*, Commerce selected the highest figure from among those that plaintiff had calculated and submitted. In a situation in which the range of figures could not be verified, the court concludes Commerce's rejection of the lower cost entries for the highest cost entry is not punitive. This is not a situation in which Commerce has rejected "low margin information in favor of high margin information that was demonstrably less probative of current conditions." *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1990). The range of cost numbers which SSAB provided could not be verified, so there is nothing in the record which would suggest that any of the figures were more or less probative of SSOX's actual U.S. shipping costs. In addition, the BIA figure which Commerce selected was one of several cost calculations that SSAB itself submitted. The court finds Commerce's choice of BIA for SSOX's U.S. shipping costs is supported by substantial evidence and in accordance with law.

With respect to SSOX's home market packing costs, SSAB was again unable to verify its submissions. *Final Determination* at 15,773. Commerce therefore resorted to partial BIA, assigning a zero value to SSOX's home market packing expenses. *Id.* Adjustments to foreign market value must be established to Commerce's satisfaction. *See* 19 U.S.C. § 1677b(a)(4) (1988) (explaining that a circumstance-of-sale adjustment must be established to Commerce's satisfaction); *see also* 19 C.F.R. §§ 353.54 (noting a party claiming an adjustment must establish its claim to Commerce's satisfaction) and 353.56(a) (1994) (providing that a circumstance-of-sale claim must be established to Commerce's satisfaction). As SSAB was unable to verify its home market packing costs, the court finds Commerce's decision to resort to partial BIA and its choice of BIA are supported by substantial evidence and in accordance with law.

IV. *Upward Adjustment on Sales Made "via" TAB:*

On occasion, TAB acted as a sales agent for certain SSAB steel sales. These sales are known as "via" sales: if TAB could not fill a customer's order from its own stock, (1) it placed an order with SSAB, (2) SSAB shipped the merchandise from its facility to the final customer, (3) SSAB billed TAB for the steel, and (4) TAB in turn billed the final customer for the steel plus a set percentage commission charge. Memorandum from Elizabeth Patience, Case Analyst, Office of Agreements Compliance, Dep't Comm., to File, at 6 (Aug. 31, 1995) [hereinafter *Analyst Memorandum*]. To summarize, the final, invoice price to the ultimate consumer was "base price" plus "commission." Upon verification, Commerce found that there were discrepancies in three of the reported commission rates, and, therefore, discrepancies in the final prices charged to the ultimate customer. *Id.*; *see also Final Determination* at 15,774. Of the three discrepancies, there were two cases in which the final price was underreported and one case in which the price was overreported. *Analyst Memorandum* at 6. Therefore, in light of these verification discrepancies, Commerce applied a BIA upward adjustment of 1.8% to all via sales prices. (Oral Argument Tr. at 42.)

SSAB does not contest that some of its via sales data submissions were erroneous. However, SSAB argues this BIA upward adjustment is not supported by substantial evidence. SSAB argues that discrepancies in the final, invoice prices occurred because there were differences in the commission rates, and that it should be the commission rates that are BIA-adjusted, not the final prices.

The court disagrees. In its verification, Commerce made a final price to final price comparison. Commerce selected a sample of sales, comparing the final prices based upon SSAB's submissions, which involved a fixed commission rate, with the final prices actually charged the ultimate customer. 42.9% of those comparisons yielded discrepancies (3/7 = 42.9%). Given this situation, the court finds Commerce's decision to apply an upward 1.8% adjustment, derived from the price differentials in the two underreported cases, to be supported by substantial evidence and in accordance with law.

CONCLUSION

Upon consideration of plaintiffs' motion for judgment upon the agency record pursuant to Rule 56.2 of the Rules of this court, defendant's and defendant-intervenor's responses thereto, and the agency record, the court remands, in part, the *Final Determination* to Commerce to consider whether foreign market value should be adjusted based upon rebates SSAB granted to certain home-market customers. The remand results shall be filed with the court within thirty days from the date of this opinion. Any party contesting the remand results shall file comments within fifteen days of the remand results. Commerce may file its response to any comments within fifteen days of the filing of the comments. Commerce's *Final Determination* is sustained in all remaining respects.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C97/71 8/28/97 Musgrave, J.	Rassini International, Inc.	94–08–00468	7320.10.3000 4%	7320.10.3000A Duty free	Agreed statement of facts	Eagle Pass, TX Leaf springs for automobiles used in suspension of motor vehicles weighing no more than 4 metric tons
C97/72 8/28/97 Musgrave, J.	Rassini International, Inc.	94–11–00700	7320.10.3000 4%	7320.10.3000A Duty free	Agreed statement of facts	Eagle Pass, TX Leaf springs for automobiles used in suspension of motor vehicles weighing no more than 4 metric tons

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